



# **Supreme Court of Victoria**

## **Commercial Court**

### **Practice Note No 10 2011**

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#### CONTACT DETAILS

Prothonotary	9603 9276	<a href="mailto:rod.ratcliffe@supremecourt.vic.gov.au">rod.ratcliffe@supremecourt.vic.gov.au</a>
Commercial Court Registrar	9603 9288	<a href="mailto:marcus.finlay@supremecourt.vic.gov.au">marcus.finlay@supremecourt.vic.gov.au</a>
Senior Registrar, Barwon South West Region (Geelong)	5225 3333	<a href="mailto:michael.bolte@magistratescourt.vic.gov.au">michael.bolte@magistratescourt.vic.gov.au</a>
Corporations List (after hours)		0412 251 757 or 0419 303 981
Arbitration List (after hours)		0412 251 757 or 0419 303 981
Other urgent matters (after hours)		0412 251 757 or 0419 303 981

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**PRACTICE NOTE NO 10 OF 2011  
(Version 1.1)**

**COMMERCIAL COURT**

The Chief Justice has authorised the issue of the following Practice Note:

**1 GENERAL**

- 1.1 The Commercial Court commenced operation on 1 January 2009. This Practice Note applies to all proceedings in the Commercial Court from 1 January 2010 and is to be read in conjunction with the provisions of the *Civil Procedure Act 2010* (Vic) (“the Act”) and supersedes Practice Note 1 of 2010. In particular it should be read with section 9 of that Act which preserves the power of the Court to make orders or to give directions in exercising powers to further the “overarching purpose” of this legislation. Chapter 2 of the Act provides for the overarching purpose and overarching obligations; in terms of their application by the courts and the obligations which apply in this respect to parties and to their legal practitioners, together with sanctions for contravention (provisions which are set out in the Appendix to this Practice Note, together with related provisions in Chapter 1 of the Act).<sup>1</sup>
- 1.2 The Act states the overarching purpose as follows (sub-section 7(1)):
- “The overarching purpose of this Act and the rules of court in relation to civil proceedings is to facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute”.*
- 1.3 This Practice Note must also be read with the *Supreme Court (General Civil Procedure) Rules 2005* (“RSC”).
- 1.4 The Commercial Court comprises specialist Judges and Associate Judges within the Commercial and Equity Division of the Trial Division of the Court, appointed by the Chief Justice from time to time to manage and try the commercial business of the Court. A feature of the Commercial Court is the commercial expertise and experience of its judges applied in an environment of continuous and, in varying degrees as appropriate, intensive case management of proceedings.<sup>2</sup>

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<sup>1</sup> In relation to the nature and purpose of an overriding objective, see the explanatory comments of Lord Woolf in *Access to Justice – Final Report* (HMSO, 1996), 174-5 (which is set out in the Appendix).

<sup>2</sup> Case management requires not only consideration of the interests of the parties to a proceeding, but also, the general public interest, as emphasised by French CJ in *Aon Risk Services Aust Ltd v ANU* (2009) 239 CLR 175 at 189-90 (this passage and some commentary on the importance of case management from the, broader, public interest perspective is set out in the Appendix).

- 1.5 The Chief Justice may from time to time appoint Judges and Associate Judges as judicial officers of the Commercial Court.
- 1.6 The Chief Justice may from time to time appoint one of the judges of the Commercial Court to be the Judge in Charge of the Commercial Court.
- 1.7 The Commercial Court is responsible for all arbitration business, domestic and international, as provided for in Practice Note 2 of 2010 - – Arbitration Business, which established the Arbitration List. The Chief Justice may from time to time appoint one of the judges of the Commercial Court to be the Judge in charge of the Arbitration List.
- 1.8 The Commercial Court is also responsible for all admiralty disputes, being cases which are brought in the court pursuant to the *Admiralty Act 1988* (Cth) and cases which concern loss or damage to a ship or by a ship, or to goods carried by sea. The Chief Justice may from time to time appoint one of the judges of the Commercial Court to be the Judge in charge of the Admiralty List.
- 1.9 A list of the judicial officers of the Commercial Court and their Associates' contact details appear on the Commercial Court website: [www.commercialcourt.com.au](http://www.commercialcourt.com.au). The Commercial Court Registrar is an officer in the Office of the Prothonotary, whose identity and contact details may be found on the website.
- 1.10 As this Practice Note will be amended from time to time, practitioners are advised to check the Commercial Court website for the up-to-date version.
- 1.11 In this Practice Note:
  - 1.11.1 'Admiralty proceeding' includes any proceeding within the admiralty jurisdiction of the Court.
  - 1.11.2 'Arbitration proceeding' means any proceeding to which Practice Note 2 of 2010 – Arbitration Business applies (being any proceeding to which RSC Ch II O 9 applies other than a TEC case within the meaning of RSC Ch II O 3;
  - 1.11.3 'Commercial proceeding' means a proceeding arising out of ordinary commercial transactions, including a taxation proceeding, a commercial partnership (urban or rural) dispute, but not including a Corporations proceeding;
  - 1.11.4 'Corporations proceeding' means any proceeding to which the *Supreme Court (Corporations) Rules 2003* apply and (without limitation) any

proceeding under or relating to the *Cross-Border Insolvency Act 2008* (Cth);<sup>3</sup>

- 1.11.5 ‘Group proceeding’ means a proceeding commenced under Part IVA of the *Supreme Court Act 1986* (Vic);
- 1.11.6 ‘Taxation appeal’ means any proceeding to which RSC Ch II O 7 applies; and
- 1.11.7 ‘Taxation proceeding’ includes a taxation appeal and any proceeding which raises a substantial issue as to taxation, including a taxation recovery proceeding, a proceeding for damages against a taxation adviser and a dispute with respect to GST.

References to the “List Judge” include a reference to a Judge or Associate Justice from time to time hearing or otherwise dealing with a proceeding in place of the Judge otherwise managing the Commercial Court list applicable to the proceeding.

- 1.12 The application of this Practice Note is set out in paragraphs 17.2 and 17.3, below.

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<sup>3</sup> See RSC Ch V r 1.3; and, in relation to the *Cross-Border Insolvency Act 2008* (Cth) see also *Practice Note No. XXX of 2011 (Cross-Border Insolvency Applications and Cooperation with Foreign Courts or Foreign Representatives)*.

## 2 COURT OBJECTIVE AND POLICIES

- 2.1 The objective of the Commercial Court is to provide for the just and efficient determination of commercial disputes by the early identification of the substantial questions in controversy, and the flexible adoption of appropriate and timely procedures for the future conduct of the proceeding which are best suited to the particular proceeding (“the Court Objective”). The Court Objective includes requiring or encouraging the application of alternative dispute resolution techniques (“ADR”) which the judicial officer considers appropriate.<sup>4</sup> This is an application of the “overarching purpose” of the Act (as stated in sub-s 7(1)),<sup>5</sup> which is to be exercised in accordance with the provisions of s 9 of the Act (Court’s powers to further the overarching purpose).
- 2.2 The practices and procedures set out in this Practice Note and used by the Commercial Court must be read and understood in the light of the Court Objective, which is paramount. The Court Objective is now an application of the provisions of the Act and the furtherance of the “overarching purpose” as stated in the Act in the context of the operation of the Commercial Court, as provided for in this Practice Note. These practices and procedures may be modified or abrogated to suit the requirements of a particular proceeding as the judicial officer considers is appropriate.
- 2.3 Proceedings will be handled with expedition unless there is good reason to the contrary. Short time periods will be permitted for interlocutory steps. At trials, time limits may be imposed for the examination and cross-examination of witnesses and for oral submissions. Opening and closing submissions may take the form of written submissions presented, but not merely read, orally. Oral presentation may be dispensed with at the discretion of the judicial officer, who may also impose limits on the extent of submissions to be provided (by reference, for example, to page limits, margin widths, type size, foot or end notes, appendices or attachments and electronic hyperlinking). The Commercial Court aims to bring proceedings not otherwise resolved to trial within nine months of issue.
- 2.4 With a view to achieving the Court Objective, the judicial officers of the Commercial Court will approach the management and trial of proceedings as follows:
- 2.4.1 they will be ready, in the appropriate case, to try new procedures suggested either by the profession or by law reform bodies or as have been adopted in other jurisdictions;
- 2.4.2 procedures will be designed to ensure that, so far as is practicable, the cost and the work involved will not be disproportionate to the

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<sup>4</sup> As to the definition of alternative dispute resolution and its application, see para 10.1.

<sup>5</sup> See para 1.2.

complexity of the issues and the value or importance of the matters in dispute in the proceeding; and

- 2.4.3 parties will be encouraged to consider whether their dispute might be better resolved by methods other than judicial adjudication in an adversarial proceeding.<sup>6</sup> Such ADR methods might include negotiated settlement, mediation, early neutral evaluation, conciliation and the like.<sup>7</sup>
- 2.5 Parties before the Commercial Court, and their practitioners, will be expected at all times:
- 2.5.1 to approach their case cooperatively as between themselves and in all aspects of their conduct before the Court and with its Officers with a view to achieving the Court Objective;
- 2.5.2 to assist the Court in the management of the proceeding to achieve the Court Objective;
- 2.5.3 not to use the resources of the Court and of the parties (whether their own clients or other parties') or witnesses, lay or expert, needlessly, or in a manner that is out of proportion to the matters in issue;
- 2.5.4 to avoid burdening the Court with unnecessarily voluminous material (electronic or paper);
- 2.5.5 to be familiar with their client's case;
- 2.5.6 to ensure that the Commercial Court's directions are followed in both letter and intent;
- 2.5.7 to ensure that their client focuses on the real issues and is aware of his, her or its obligations under the Act, the Practice Note and the RSC;
- 2.5.8 to ensure that the proceeding moves without delay towards determination whether at trial, by ADR process, or otherwise;
- 2.5.9 to identify any matters which are suitable for determination by an Associate Judge; and
- 2.5.10 to consider whether the proceeding might benefit from the adoption of the procedures set out in Practice Note No 1 of 2007 – *Guidelines for the Use of Technology in any Civil Litigation Matter* and, if so, to what extent.

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<sup>6</sup> See paras 8.9.5 and 10.1.

<sup>7</sup> See Chapters 10 and 11.



- 2.6 The Commercial Court will normally sit on Monday to Thursday (between the hours of 10.00am and 12.30pm and 2.15pm and 4.15pm), reserving Fridays for directions and applications. Directions dates for each list are published on the Commercial Court website. The Commercial Court also provides its services in Geelong (on a demand basis rather than as a circuit arrangement). Directions dates in Geelong are available from the Supreme Court offices in Geelong (contact the Senior Registrar, Barwon South West Region).
- 2.7 Dispensation from the requirements of RSC Ch I r 1.17, that a corporation may not take a step in a proceeding save by a legal practitioner, will be granted only in exceptional cases.

### **3 ENTRY OR REMOVAL OF PROCEEDINGS**

- 3.1 The following proceedings are suitable for entry into the Commercial Court:
- 3.1.1 any Commercial proceeding unless the proceeding is more suitable for one of the other specialist lists, or unless it is more appropriately managed and tried in the Commercial and Equity Division outside the Commercial Court;
  - 3.1.2 all Corporations proceedings;
  - 3.1.3 all Arbitration proceedings;
  - 3.1.4 all Admiralty proceedings; and
  - 3.1.5 such other class of proceedings as the Chief Justice may from time to time direct.
- 3.2 A proceeding will not be refused entry to the Commercial Court by reason only that it is expected to require a trial of more than 10 days or by reason only of its character as a group proceeding. There is no restriction on the entry of a group proceeding into the Commercial Court; but subject to the discretion of a judicial officer to decide that the proceeding would be more conveniently and expeditiously handled in the Commercial and Equity Division outside the Commercial Court, or in the Common Law Division. Entry may be refused to a proceeding where the plaintiff is self-represented or where a party or a witness would require translation services (written or oral) which would have the effect of causing significant delay to the progress of the proceeding, whether at interlocutory or trial stage, or both.
- 3.3 All proceedings which were in the Commercial List, or the list of Corporations cases, on 1 January 2009 were automatically entered in the Commercial Court.
- 3.4 All Corporations proceedings are automatically entered in the Commercial Court.
- 3.5 All Taxation appeals are automatically entered in the Commercial Court.
- 3.6 All Arbitration proceedings are automatically entered in the Commercial Court.
- 3.7 All Admiralty proceedings are automatically entered in the Commercial Court.
- 3.8 Other suitable proceedings may be entered into the Commercial Court:
- 3.8.1 by including in the heading of the initiating process at the time of commencement, the words 'Commercial Court'; or

- 3.8.2 by order of a Commercial Court Judge.
- 3.9 Practitioners should note the following:
- 3.9.1 the heading of all Commercial Court documents should conform with **Schedule 1**;
- 3.9.2 where a proceeding is entered in the Commercial Court upon commencement, the initiating process should not specify a particular list. Unless the allocation of a proceeding to a list has already been ordered by a judicial officer, the allocation will be effected by the Commercial Court Registrar and the parties notified; and
- 3.9.3 once a proceeding has been allocated to a list, all Court documents filed in the proceeding should bear in the heading the list identifier in accordance with **Schedule 1**.
- 3.10 Any party to a suitable proceeding that has not been entered in the Commercial Court may apply for entry upon summons seeking entry and directions. An application for entry of a proceeding into the Commercial Court must be filed with the Commercial Court Registrar who will nominate a time and date for hearing, and allocate the application to a Commercial Court Judge. Such applications will usually be granted if the proceeding is suitable for entry into the Commercial Court. Applications for entry of new matters in the Commercial Court at Geelong should be made to the Senior Registrar, Barwon South West Region, at the Supreme Court offices in Geelong. Applications to transfer a proceeding already entered in the Commercial Court to Geelong should be made to the Commercial Court Registrar. The entry of matters in the Commercial Court at any particular location does not preclude application being made to the List Judge to transfer the location of a proceeding or to arrange for its hearing, in whole or in part, at a different location from that of its entry (and a matter may be transferred on such basis as considered appropriate on the Judge's own motion). In particular, proceedings entered at Melbourne may be heard at any Supreme Court location in Victoria as the Judge considers appropriate.
- 3.11 All proceedings in the Commercial Court, other than those specified below, will be treated as Commercial List cases for the purposes of the Supreme Court (Fees) Regulations 2001. They attract an entry fee pursuant to item 1.8. The following proceedings do not attract an entry fee:
- 3.11.1 Corporations proceedings;
- 3.11.2 Taxation appeals;
- 3.11.3 Arbitration proceedings; and

3.11.4 Admiralty proceedings.

- 3.12 The entry fee is payable by the plaintiff or, where the proceeding was not entered in the Commercial Court upon commencement, by the applicant for entry, and will form part of that party's costs of the proceeding.
- 3.13 When an order for entry is made, the Court will require from the practitioner for the applicant an undertaking to pay the prescribed fee, and practitioners should have instructions to give such an undertaking.
- 3.14 On the application of any party, or upon the Court's own motion, a proceeding in the Commercial Court, other than a Corporations proceeding, a Taxation proceeding, an Arbitration proceeding, or an Admiralty proceeding, may at any time be removed from the Commercial Court if it is or has become one which, by reason of its size or for any other reason is more appropriately managed and tried outside the Commercial Court or in another of the specialist lists.
- 3.15 In order to facilitate communications with the Commercial Court the party entering a proceeding must supply contact details (address, telephone and email) for itself and all other parties for which it has all or some contact information. It is sufficient for represented parties to provide contact details for their legal practitioners only. The parties and their legal practitioners (if any) remain subject to an ongoing obligation to provide all current contact information and must, subsequent to the entry of a proceeding, provide that information to the Associate to the allocated List Judge.

## 4 ALLOCATION OF PROCEEDINGS

- 4.1 A proceeding in the Commercial Court will be allocated to one of the lists which is dedicated to the type of business to which the proceeding predominantly relates and otherwise to one of several lists identified by letter (List A, B, C, D or E). A Judge and an Associate Judge will be assigned to each list and will manage and try the proceedings within that list.
- 4.2 In general, the business of the lists will be allocated (as the named lists indicate) as follows:
- 4.2.1 Admiralty List;
  - 4.2.2 Arbitration List;
  - 4.2.3 Corporations List;
  - 4.2.4 Taxation List; and
  - 4.2.5 Lists A, B, C, D and E – other types of business.
- 4.3 The allocation of a proceeding to a particular list will be effected as follows:
- 4.3.1 where the proceeding is entered upon commencement, by the Commercial Court Registrar; or
  - 4.3.2 where the proceeding is entered by order of a Commercial Court Judge, by the Judge.<sup>8</sup>
- 4.4 A proceeding in the Commercial Court may be transferred from one list to another list by order of the List Judge of the transferor list.
- 4.5 Where a proceeding is entered in the Commercial Court and it raises urgent matters the Commercial Court Registrar should be advised at the time the proceeding is entered. The Commercial Court Registrar will then enter the proceeding giving any urgent application a return date being the then next Friday directions day scheduled for the Judge in whose list the proceeding has been entered. If the matter is more urgent than this arrangement would accommodate the practitioner entering the proceeding must contact the Associate to the allocated List Judge and request an urgent hearing of the urgent application, providing a concise summary of the reasons for the urgency. Except where the urgent application may be made *ex parte* (without notice to any other party), any such communication must be made in writing (preferably by e-mail) with a copy of the communication provided at the same time to the practitioners for all other represented parties and directly to any

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<sup>8</sup> See para 3.9.

unrepresented parties.<sup>9</sup> Depending upon the commitments of the allocated List Judge it may be necessary for the urgent application to be directed by that List Judge to another Judge. In relation to urgent applications more generally, see Chapter 6.

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<sup>9</sup> As to communication with the Commercial Court generally, see para. 5; particularly para. 5.4.

## 5 COMMUNICATIONS WITH THE COMMERCIAL COURT

- 5.1 Communication between parties or their representatives and the associates to judicial officers is often necessary for the smooth running of the Commercial Court. All such communications must be undertaken with care to ensure that the impartiality and integrity of the Court is not seen to be compromised.
- 5.2 Communications to the Commercial Court should be directed to:
- (a) the Commercial Court Registrar, where the communication concerns a registry matter;
  - (b) the associate of the List Judge, where the communication concerns a matter in a list, or if this is not possible, to the associate of the List Associate Judge; or
  - (c) otherwise to the associate of the Judge in Charge of the Commercial Court.
- 5.3 All communications with an associate must be open and confined to uncontroversial matters. It is not part of the function of the associate to give advice upon procedural or legal matters. Persons communicating with them should not request such advice.
- 5.4 Wherever possible, communication with an associate should be in writing and preferably by e-mail to the “List email address” applicable to the list in which the proceeding has been placed (List email addresses will be published separately on the Commercial Court website). Documents which are directed to be filed may, unless the Rules otherwise require, be filed electronically with the associate. Any person writing to an associate must, except for communications relating to an *ex parte* (without notice to any other party) application, simultaneously send a copy to each other party to the proceeding. Communication with an associate by telephone should be avoided in all but purely administrative or routine matters; but even in relation to these matters communication in writing (by email or letter) is preferable to avoid any misunderstanding or misapprehension in relation to the communication.
- 5.5 Persons communicating with an associate must ensure that the associate does not become part of a dispute between the parties or their representatives. Associates may be contacted in relation to the following:
- 5.5.1 the listing of applications, or the listing of directions;
  - 5.5.2 whether a summons is required or whether an application can be listed less formally; and

- 5.5.3 the filing of material for the judicial officer in addition to filing with the Registry.<sup>10</sup>
- 5.6 Before consulting an associate to fix a date for a hearing, parties should first consult on the time for hearing of an application (except in *ex parte* hearings, or where otherwise unavoidable), and endeavour to reach an agreement.<sup>11</sup>
- 5.7 The following questions should only be raised in open court and should not be directed to associates:
  - 5.7.1 whether the judicial officer will fix a proceeding for trial early, within a specified period or before pre-trial steps are completed; and
  - 5.7.2 whether another judicial officer is available to hear a trial or application at an early date.

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<sup>10</sup> See paras 9.15, 9.16 and 9.22.

<sup>11</sup> See para 9.2.



## 6 URGENT APPLICATIONS

- 6.1 Commercial Court Judges and Associate Judges are ordinarily available to hear all urgent applications, including, if required, outside normal Court hours. The Corporations list and the Arbitration list **[plus Admiralty?]** is available at all times (24 hours per day, seven days per week) for urgent applications.
- 6.2 Applicants seeking to make an urgent application before the commencement of a proceeding to be entered in the Commercial Court should contact the Commercial Court Registrar for an appointment. If this is not practicable the applicant should contact the associate to the Judge in Charge of the Commercial Court or, if this is not practicable, the Judge in the Practice Court.
- 6.3 Where the urgent application is to be made in a proceeding already entered in the Commercial Court, the applicant should contact:
- 6.3.1 the associate to the List Judge or the List Associate Judge as is appropriate;<sup>12</sup> or if this is not practicable;
  - 6.3.2 the Commercial Court Registrar; or if this is not practicable;
  - 6.3.3 the associate to the Judge in Charge of the Commercial Court; or if this is not practicable;
  - 6.3.4 the associate to the Judge in the Practice Court.
- 6.4 If the application is one that is properly made *ex parte* (without notice to any other party), this should be clearly stated in all communications with any of the individuals specified in the preceding paragraph<sup>13</sup> and such communications need not be copied to the respondent until the interim determination of the application or as the List Judge otherwise orders.
- 6.5 Practitioners are referred to paragraph 9.24 regarding the form of the “usual undertaking as to damages”.

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<sup>12</sup> See paras 9.6 and 9.7.

<sup>13</sup> Para 6.2.

## 7 CASE MANAGEMENT CONFERENCE

- 7.1 The Court may order a Case Management Conference at any time. The decision whether to hold a Case Management Conference, at any particular time or at all, is itself a question to be determined at the discretion of the List Judge as part of the process of efficient case management in furtherance of the Court Objective, hence the overarching purpose of the Act.<sup>14</sup> Not every proceeding in the Commercial Court requires a Case Management Conference, a process that necessarily involves time and cost. Nevertheless, in proceedings which do warrant a conference of this kind the reduction of time and cost as a result of a conference would, in the usual course, be expected to well outweigh any time and cost associated with the conference. An assessment of this kind would ordinarily be expected to weigh heavily as a factor going to the exercise of the Judge's discretion, assisted by submissions by or on behalf of the parties.
- 7.2 A Case Management Conference is not merely another directions hearing. The leading counsel for each party who will have the conduct of the proceeding at trial is required to attend.
- 7.3 The purpose of a Case Management Conference is to advance the Court Objective, as indicated, by:
- 7.3.1 identifying, defining and refining the issues requiring judicial resolution;
  - 7.3.2 determining interlocutory steps necessary for the preparation of a proceeding; and
  - 7.3.3 determining how the trial might best be conducted.

### *Pre-Conference Arrangements*

- 7.4 If a Case Management Conference is to be held the List Judge will give directions with respect to the provision of the Case Management Bundle.
- 7.5 Following delivery of the Case Management Bundle, the associate to the List Judge will arrange a convenient date for the Case Management Conference.

### *Case Management Bundle*

- 7.6 Subject to the directions of the List Judge, the Case Management Bundle is to be prepared by the solicitors for the plaintiff for the purpose of the conference and must contain:

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<sup>14</sup> See paras. 2.1 and 2.2.

- 7.6.1 all pleadings;
- 7.6.2 the Case Memorandum;
- 7.6.3 the draft list of issues;
- 7.6.4 the completed Case Management Information Sheets;<sup>15</sup>
- 7.6.5 the principal orders in the proceeding; and
- 7.6.6 any other document which a party may consider necessary and relevant to the conference and which the List Judge decides should be included.

The parties will be responsible for the upkeep of the Case Management Bundle as the case proceeds in the following stages (or as otherwise directed by the List Judge):

- 7.6.7 within 10 days of the Case Management Conference, in order to add the pre-trial timetable (or any other order made at the conference) and an updated Case Memorandum;
- 7.6.8 within 10 days of an order being made on an application, if in the light of the order or the application it is necessary to add a copy of the order made (as a principal order in the case) or an updated Case Memorandum;
- 7.6.9 within 14 days of the service of any amended Statement of Claim, in order to substitute a copy of the amended Statement of Claim for that which it replaces and to incorporate an updated Case Memorandum and (if appropriate) a revised list of issues;
- 7.6.10 within 10 days of any other revision to the Case Memorandum or list of issues, in order to incorporate the revised document.

### ***Case Memorandum***

- 7.7 The solicitors for the plaintiff will be responsible for seeking agreement between the parties with respect to the production and filing of an agreed Case Memorandum for the use of the List Judge at the conference. The Case Memorandum must contain:
  - 7.7.1 a short and uncontroversial description of what the proceeding is about; and

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<sup>15</sup> See Schedule 2.

- 7.7.2 a very short and uncontroversial summary of the material procedural history of the proceeding.
- 7.8 In the absence of agreement between the parties the party or parties not in agreement with the plaintiff with respect to the Case Memorandum must produce and file a Case Memorandum in the form considered appropriate by that party or parties or, if the extent of disagreement is not substantial, a Statement clearly stating the nature and extent of the disagreement and the reason or reasons for the disagreement. It would not be expected, other than in exceptional circumstances, that more than one additional Case Memorandum or Statement would be produced and filed. The failure of the parties to agree a Case Memorandum may be taken into account by the Court when dealing with the costs of the conference.

### ***Draft list of Issues***

- 7.9 The parties' legal advisers will as far as is reasonably possible seek to obtain the agreement of all parties to an agreed draft list of the important issues in the proceeding for the purpose of the Case Management Conference. When agreement cannot be reached each party will provide its own list of issues
- 7.10 The purpose of the list of issues is not to supplant or override the pleadings but, rather, to identify precisely what issues are in dispute having regard to the pleadings. It is expected that the list of issues will (subject to the pleadings) form the basis of the further procedural steps to be undertaken in the expeditious management of the proceeding. It follows that, issues which are not in the list are not expected to be entertained during the trial of the proceeding (or any part of the proceeding).
- 7.11 The draft list of issues should include issues both of fact and of law.
- 7.12 A separate section of the document should list those matters in which there is common ground between the parties.
- 7.13 The draft list of issues may be settled at the Case Management Conference in consultation with the List Judge.

### ***Case Management Information Sheet***

- 7.14 All parties required to attend a Case Management Conference must have completed a Case Management Information Sheet which is to be included within the Case Management Bundle. The standard form of Case Management Information Sheet is **Schedule 2** to this Practice Note.

### ***Pre-Trial Timetable and Directions***

- 7.15 At the Case Management Conference, directions may be made in relation to the following matters:
- 7.15.1 a date for trial;
  - 7.15.2 mediation or alternative dispute resolution procedures;<sup>16</sup>
  - 7.15.3 the manner in which evidence will be given;<sup>17</sup>
  - 7.15.4 the preparation of a statement of agreed facts;
  - 7.15.5 the making of admissions, whether by notice to admit or otherwise;
  - 7.15.6 the time for preparation of any witness statements (if any are to be ordered) and, alternatively or additionally, any witness outlines;<sup>18</sup>
  - 7.15.7 the preparation of any expert reports and the manner in which evidence will be given by experts;<sup>19</sup>
  - 7.15.8 the disclosure of critical documents in accordance with section 26 of the Act;<sup>20</sup>
  - 7.15.9 discovery including any limitation upon its scope, timing, inspection, copying and the resolution of discovery disputes;<sup>21</sup>
  - 7.15.10 the preparation of a Court Book (if any);<sup>22</sup>
  - 7.15.11 notice of objection to evidence;
  - 7.15.12 preparation of a chronology;
  - 7.15.13 preparation of opening submissions;
  - 7.15.14 a statement of the issues for trial;
  - 7.15.15 the separate trial of a preliminary question;<sup>23</sup>

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<sup>16</sup> See Chapter 10.

<sup>17</sup> See Chapter 13.

<sup>18</sup> See para 13.10–13.24.

<sup>19</sup> See para 13.25–13.27.

<sup>20</sup> See para 12.6.

<sup>21</sup> See para 12.6–12.7.

<sup>22</sup> See Chapter 13.

<sup>23</sup> See para 14.3.

- 7.15.16 the date and time of any further directions hearing;
  - 7.15.17 what, if any, applications are to be heard and determined by an Associate Judge;<sup>24</sup>
  - 7.15.18 any special orders in relation to evidence to be given by video link;
  - 7.15.19 return of any subpoenas; and
  - 7.15.20 the determination of any other interlocutory disputes such as security for costs, provision of particulars and disputes in relation to the production and inspection of documents.
- 7.16 The pre-trial timetable may also include the fixing of a progress review date by which each of the parties must send to the List Judge a statement indicating:
- 7.16.1 whether that party has complied with the pre-trial timetable in all respects;
  - 7.16.2 in what respect, if any, that party has not complied with the pre-trial timetable;
  - 7.16.3 whether that party will be ready for trial commencing on the fixed date; and
  - 7.16.4 if that party is not ready for trial on the fixed date, a statement of why that is so.
- 7.17 Not later than three weeks before the date fixed for trial, each party must send to the associate to the List Judge (with a copy to all other parties) a completed Pre-Trial Checklist confirming the final details for trial in the form attached as **Schedule 3**.

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<sup>24</sup> See para 9.7–9.8.

## 8 DIRECTIONS HEARINGS

- 8.1 All directions hearings will be conducted by the List Judge or the List Associate Judge. Directions hearings will normally be conducted on Fridays except during Court vacation periods.
- 8.2 Notwithstanding that most interlocutory steps will be taken pursuant to Court order, practitioners are encouraged to anticipate such orders rather than leave the initiative entirely to the Court. The Court regards pro-active steps of this kind as an important aspect of the obligations of parties and their legal practitioners to co-operate to achieve the overarching purpose of the Act and the Court Objective.<sup>25</sup>

### *First Directions Hearing*

- 8.3 Where a proceeding is entered into the Commercial Court upon commencement, the Commercial Court Registrar will appoint a date for the first directions hearing before the List Judge. This directions hearing will be conducted by the List Judge.
- 8.4 Plaintiffs must ensure, as far as practicable, that all other parties are served with the originating process a reasonable time before the first directions hearing. Failure to do so risks costs consequences.
- 8.5 At the first directions hearing the parties, if represented, will be expected to appear by their legal practitioner. They should be ready to explain briefly, if requested, the nature of the dispute and the substantial questions in controversy, and to assist the Court to determine the course to be followed in order to achieve the Court Objective.
- 8.6 In shareholder oppression proceedings, partnership disputes and any other proceeding where the value of a business is likely to be in issue, the Commercial Court will usually direct the immediate appointment of a Valuer. A standard valuation order appears in **Schedule 4**.

### *Matters for Consideration at the First Directions Hearing*

- 8.7 At the first directions hearing, orders will be made and directions given with a view to achieving the Court Objective. All parties are expected to have considered whether orders or directions should be made relating to:
- 8.7.1 the filing and service of pleadings;
  - 8.7.2 the provision of proper particulars;
  - 8.7.3 the joinder of any further parties or claims between parties;

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<sup>25</sup>

See para 2.2.

- 8.7.4 whether an order should be made for the separate trial of any question;
- 8.7.5 whether the proceeding is appropriate to be conducted in accordance with the procedures set out in Practice Note No 1 of 2007 – *Guidelines for the Use of Technology in any Civil Litigation Matter* and, if so, to what extent;
- 8.7.6 whether the proceeding or any matter arising in the proceeding should be managed by an Associate Judge;<sup>26</sup>
- 8.7.7 whether the matter should be referred to mediation, or to some other alternative dispute resolution procedure;<sup>27</sup> and
- 8.7.8 whether any of the procedures referred to in paragraph 8.9 should be adopted.

### ***Further Directions Hearings***

- 8.8 Further directions hearings will be heard by the List Judge or the List Associate Judge, as the Commercial Court directs. The Court will seek to keep the number of directions hearings to a minimum in order to avoid unnecessary costs.
- 8.9 At directions hearings, the Commercial Court may adopt one or more of the following procedures as are considered appropriate to achieve the Court Objective:
  - 8.9.1 encouraging the parties to cooperate with each other in the conduct of the proceeding;
  - 8.9.2 identifying the questions in issue at an early stage;
  - 8.9.3 deciding promptly which questions need full investigation and trial and disposing summarily of others;
  - 8.9.4 deciding the sequence in which questions are to be determined;
  - 8.9.5 encouraging the parties to use alternative dispute resolution procedures;<sup>28</sup>
  - 8.9.6 encouraging and helping the parties to settle all or part of the dispute;
  - 8.9.7 fixing timetables or otherwise controlling the progress of the proceeding;

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<sup>26</sup> See paras 9.7 and 9.8.

<sup>27</sup> See Chapter 10.

<sup>28</sup> See Chapter 10.



- 8.9.8 considering whether the likely benefits of taking a particular step justify the cost of taking it;
- 8.9.9 dealing with as many aspects of the proceeding as possible on the same occasion;
- 8.9.10 managing the proceeding by making interlocutory orders on the papers, that is, upon written application and material without the necessity of appearance before the Court;<sup>29</sup> and
- 8.9.11 making use of technology (such as, for example, the provision of an electronic court book (if a court book has been ordered), the provision of an electronic running transcript and arrangements for the video conferencing of witnesses).<sup>30</sup>

### ***Taxation Appeals***

- 8.10 In the ordinary course of events the List Judge will, at the first directions hearing, set the appeal down for hearing and give the appropriate directions for the hearing, including outlines of argument.
- 8.11 In an application to appeal from VCAT, the List Judge will normally set the application down to be heard with the appeal. It should not be assumed that this will always occur and the applicant should be prepared to state in summary form at the directions hearing why the application should proceed.<sup>31</sup>

### ***Liberty to Apply***

- 8.12 Parties are encouraged to avail themselves of the general liberty to apply implied in every interlocutory order. Parties may cause a proceeding to be listed for urgent directions on a date other than a directions day. A party seeking to do so should make prior arrangements with, or give appropriate notice to, all other parties, and should contact the associate of the List Judge or List Associate Judge to arrange a suitable time.<sup>32</sup>

### ***Final Directions Hearings***

- 8.13 A proceeding may be listed for a final directions hearing shortly prior to the scheduled start of the trial. A final directions hearing may be listed by the List Judge or List Associate Judge or at the request of any party. Matters that may be addressed are set out in **Schedule 5**.

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<sup>29</sup> See paras 9.19–9.24.

<sup>30</sup> Practice Note No 1 of 2007 – *Guidelines for the Use of Technology in any Civil Litigation Matter*.

<sup>31</sup> See *Secretary to the Department of Premier and Cabinet v Hulls* [1999] 3 VR 331 at [8]–[17].

<sup>32</sup> See para 15.2.

## 9 OTHER APPLICATIONS

### 9.1 Applications:

- 9.1.1 should be made returnable before the List Judge or the List Associate Judge as is appropriate;
- 9.1.2 should not be brought unless the parties have already made appropriate endeavours to resolve their disputes. Where the parties cannot resolve them, they should cooperate in the listing of the application and the preparation of material to be handed up at the hearing of the application; and
- 9.1.3 will normally be made returnable on the date of the next directions hearing provided that the List Judge or List Associate Judge may fix another date in the appropriate case.

- 9.2 Where a listing of an *inter partes* (between parties) interlocutory application, other than an application for entry into the Commercial Court or for preliminary discovery,<sup>33</sup> is sought the parties should first consult to agree on a suitable date for the hearing and then contact the associate to the relevant judicial officer (e-mail is preferred) to ascertain if the agreed date is convenient to the Court. The Court will then make the necessary arrangements and advise the parties accordingly.

### ***Applications on Notice and not by Summons***

- 9.3 Except in the circumstances described below, routine applications may be made upon notice and need not be made by summons. In some cases the List Judge will indicate in the course of the proceedings that a particular application need not be made by summons. Otherwise, as a general guide, the Commercial Court considers the following to be routine:
  - 9.3.1 directions as to the timing of interlocutory steps;
  - 9.3.2 applications and disputes concerning particulars;
  - 9.3.3 applications and disputes concerning discovery;
  - 9.3.4 applications for extension of time; and
  - 9.3.5 applications for the minor amendment of pleadings or other documents.
- 9.4 Where an application is made on notice and not by summons, the applicant must file and serve a clear statement in writing of the orders and directions sought. This

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<sup>33</sup> See paras 9.31–9.33.

may be achieved by email, with or without the use of attached correspondence or other documentation. The Court will be flexible provided the objective of notice is achieved – namely the provision of a clear and unambiguous statement of the nature of the application, the basis upon which it is made (as the nature of the application and circumstances require) and the orders sought.

### ***Application by Summons***

- 9.5 Applications must be made by summons in the following circumstances unless a Judge orders otherwise:
- 9.5.1 where a respondent to the application is not legally represented;
  - 9.5.2 where a respondent to the application is not a party to the proceeding;
  - 9.5.3 applications to enter a proceeding in the Commercial Court;
  - 9.5.4 applications for security for costs;
  - 9.5.5 applications for strike out of a pleading, for summary judgment, for summary stay or dismissal of a claim or similar applications;
  - 9.5.6 applications to join a party;<sup>34</sup>
  - 9.5.7 applications for significant amendments to pleadings or other documents;
  - 9.5.8 applications to vacate a trial date;
  - 9.5.9 applications for injunctive relief;
  - 9.5.10 cross-vesting and other forum-related applications; and
  - 9.5.11 where the parties have been unable to reach agreement in accordance with paragraph 9.2.

### ***Applications to be Brought Before List Judges***

- 9.6 Unless a Judge orders otherwise, applications other than those described in paragraph 9.7 should be brought before the List Judge.

### ***Applications to be Brought Before List Associate Judges***

- 9.7 The following applications are to be brought before the List Associate Judge unless a Judge orders otherwise:

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<sup>34</sup> See paras 9.27–9.30.

- 9.7.1 applications for substituted service;
  - 9.7.2 applications concerning discovery, including non-party discovery and preliminary discovery;<sup>35</sup>
  - 9.7.3 applications concerning particulars;
  - 9.7.4 applications for security for costs;
  - 9.7.5 applications for assessment of damages;
  - 9.7.6 applications concerning subpoenas;
  - 9.7.7 other applications within the power conferred on an Associate Judge by or under RSC Ch I O 77;
  - 9.7.8 applications within the power conferred on an Associate Judge by RSC Ch V r 16.1(1).
- 9.8 Where this is permitted by the Rules,<sup>36</sup> an application may be referred for hearing and determination by a List Judge to the List Associate Judge and by a List Associate Judge to the List Judge.

### ***Filing and Service of Inter Partes Interlocutory Applications***

- 9.9 Applications and supporting material should be filed and served as early as possible to enable the respondent to prepare for the hearing and file and serve responsive material in a timely manner, and to enable the judicial officer hearing the application to read the material before the hearing.
- 9.10 Subject to the directions of the List Judge, where an application is listed for hearing on a Friday directions day then, except for particularly complicated or voluminous applications where more time should be allowed, the following deadlines should be observed unless there is good reason for failing to do so (the reason for which must be communicated to the Court as soon as possible):
- 9.10.1 the applicant's material should be filed and served:
    - 9.10.1.1 by 4.00 pm on the preceding Tuesday, where the proceeding is not already listed for the following Friday;
    - 9.10.1.2 by 4.00 pm on the preceding Wednesday, where the proceeding is already listed for the following Friday;

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<sup>35</sup> See paras 9.31–9.33.

<sup>36</sup> See RSC Ch I r 77.04–77.05 and RSC Ch II r 1.11–1.12.

- 9.10.2 the respondent's material should be filed and served by 4.00 pm on the Thursday.
- 9.11 Where an application is listed for hearing on a day other than Friday, material should be filed and served in advance of the hearing, with equivalent time lines.
- 9.12 A failure by a party to observe the deadlines in paragraphs 9.10 and 9.11 may result in the application being adjourned or dismissed with costs consequences for the defaulting party.
- 9.13 Contrary to the normal practice of the Prothonotary, in Commercial Court proceedings original exhibits are to be filed together with affidavits. Exhibits that are no longer required will be returned to the parties in Court.
- 9.14 It is not necessary to file an affidavit reporting the progress of the proceeding, exhibiting the transcript in the proceeding, orders previously made or other court documents in the proceeding.
- 9.15 Correspondence between practitioners that is sought to be put before the Court need not be exhibited to an affidavit. Where the applicant intends to rely on such correspondence, the applicant should file a bundle of all relevant correspondence between the practitioners for the parties in chronological order.
- 9.16 Parties should contact the associate to the judicial officer allocated to hear the application for instructions as to whether material should be filed at the Registry or with the associate.

### *Hearing of Applications*

- 9.17 In substantial contested applications, the applicant should provide the Court with a small application book containing working copies of the key documents.
- 9.18 Paragraphs 14.13–14.15 below with respect to the provision of authorities at trial apply equally to applications.

### *Orders on the Papers*

- 9.19 Other than at the first directions hearing and at the Case Management Conference, consent orders may be submitted to the Court and may be made on the papers without the necessity of an appearance.
- 9.20 Consent orders, signed by each party, should be faxed or e-mailed to the associate by **12.00 noon** on the **day before** the directions hearing. Where consent orders are not received by 12.00 noon the day before the directions hearing, parties should assume that they will be required to appear unless notified otherwise by the Court.

- 9.21 Notwithstanding that the parties have agreed and submitted proposed consent orders, the Commercial Court may require the attendance of practitioners and may not make the proposed orders.
- 9.22 Where the parties attend court in circumstances where it would have been reasonable to make a consent order on the papers, the Commercial Court may decline to award a party or all parties, depending on the circumstances, the costs of its or their attendance and may make costs orders against a party responsible for an unnecessary hearing.
- 9.23 Where orders are not sought by consent but are unopposed, the party seeking the orders should submit them to the associate to the List Judge or the List Associate Judge, as the case may be, with written material which discloses that the proposed orders are unopposed. The Commercial Court may make such orders on the papers or may require the attendance of the parties. The Commercial Court may set aside or vary an unopposed order made on the papers upon application by a respondent.
- 9.24 Where the parties consent in writing, the Commercial Court may entertain an application other than a consent application on the papers and may give directions for that purpose.

### ***Usual Undertaking as to Damages***

- 9.25 Where an applicant for an interlocutory order offers, or the Court accepts, or an order or other Court document records the giving of ‘the usual undertaking as to damages’, this will be taken to mean the following undertaking given to the Court:

***To abide by any order which this Court might make as to damages, in case this Court shall be of opinion that any person shall have sustained any loss, by reason of this order, which the party giving the undertaking ought to pay.***<sup>37</sup>

### ***Costs***

- 9.26 The Commercial Court may fix the costs awarded on an interlocutory application to save the parties the cost and time of taxation. To this end the Court may from time to time publish a document setting out the ordinary range of party and party costs which may be fixed on an interlocutory application. Costs may be ordered on a party and party basis, a solicitor and client basis, on an indemnity basis or on such other basis as the Court may direct, in accordance with RSC Order 63. The Court may also encourage parties to resolve costs issues (including liability for costs, the basis upon which costs are to be determined (special or ordinary) and the quantum of costs) by mediation. Mediation of these issues will be ordered when appropriate; whether or not on the application of a party.

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In relation to the form of the usual undertaking as to damages see also *Civil Procedure Victoria* [I 38.01.320].

### ***Applications to Join Third Parties or Other Parties***

- 9.27 An application for leave to join a third party or another party should be brought by summons supported by an affidavit setting out the basis for the joinder and including a proposed statement of claim against the party to be joined.
- 9.28 Any such application must be brought as soon as practicable. The Commercial Court may fix a date within which such an application must be brought. Where an application is made in breach of this requirement, the application may be refused or orders made so that the joinder will not affect the management of the proceeding. In addition, the Commercial Court may make costs orders against a party which unnecessarily delays making such an application.
- 9.29 The summons and supporting affidavit must be filed and served on all existing parties and the proposed third party or other party within sufficient time to permit the third party or other party to file a notice of appearance and otherwise to determine whether to appear on the hearing of the application, and to enable the party, if joined, to seek or to be subject to directions.
- 9.30 At the time of service the applicant must inform the proposed third party or other party that if that party does not appear at the hearing of the application, the Commercial Court may, in addition to granting leave for the joinder, make directions consequent upon the joinder and may make other interlocutory orders affecting the parties generally, including the party joined.

### ***Applications for Preliminary Discovery***

- 9.31 An application for preliminary discovery under RSC Ch I r 32.03 or r 32.05 in a commercial matter should be made returnable before an Associate Judge of the Commercial Court.<sup>38</sup>
- 9.32 The applicant should, in the first instance, contact the Commercial Court Registrar for a date and time for the hearing of the application. The Commercial Court Registrar will make enquiries as to the availability of an Associate Judge to hear the application and will notify the applicant accordingly.
- 9.33 An application for preliminary discovery must be made by originating motion and summons on originating motion and served upon each party from whom preliminary discovery is sought.

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<sup>38</sup> See para 9.7.2.

## 10 ALTERNATIVE DISPUTE RESOLUTION

10.1 At any stage of a proceeding (including during trial) the Court may direct that the proceeding be referred for such alternative form of dispute resolution as may seem appropriate to the circumstances of the proceeding with a view to disposing of the proceeding more efficiently, quickly and economically than by trial.<sup>39</sup> The range of techniques comprehended by “alternative dispute resolution” is very broad, as is demonstrated by the definition of “appropriate dispute resolution” (a term used interchangeably) contained in section 3 of the Act:

*appropriate dispute resolution* means a process attended, or participated in, by a party for the purposes of negotiating a settlement of the civil proceeding or resolving or narrowing the issues in dispute, including, but not limited to –

- (a) mediation, whether or not referred to a mediator in accordance with rules of court;
- (b) early neutral evaluation;
- (c) judicial resolution conference;
- (d) settlement conference;
- (e) reference of a question, a civil proceeding or part of a civil proceeding to a special referee;
- (f) expert determination;
- (g) conciliation;
- (h) arbitration.

This definition also serves to illustrate the scope, possibilities and flexibility of ADR, particularly when the possible combination of processes is considered. ADR techniques may also be applied to part of a proceeding in the Commercial Court – whether with respect to particular stages of the proceeding or to particular issues within a proceeding. For example, mediation after the delivery of a judgment on liability but prior to resumption of the proceedings with respect to quantum may be appropriate. Similarly, use of an expert special referee may be appropriate for discrete technical questions (including, for example, valuations and the evaluation of mathematical models relevant to the question of damages).

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<sup>39</sup> See para 2.4.3.



- 10.2 Practitioners in all proceedings in the Commercial Court should consult with their clients and with the legal practitioners for other parties as to the possibility of attempting to resolve the proceeding as a whole or particular issues in the proceeding (prior to and in the course of the proceeding)<sup>40</sup> by alternative dispute resolution and should ensure that their clients are fully informed as to the most cost-effective means of resolving the proceeding.
- 10.3 All proceedings will be referred to mediation unless the List Judge decides that there is a good reason to the contrary. Mediation of costs issues may be ordered when appropriate.
- 10.4 The List Judge may refer the proceeding or any question or application arising in the proceeding to an Associate Judge for mediation.
- 10.5 A standard mediation order appears in **Schedule 6**.
- 10.6 Practitioners are encouraged to identify whether questions in the proceeding should be referred to a Special Referee pursuant to RSC Ch I O 50 and, if so, at what stage.
- 10.7 A standard order for reference to a Special Referee appears in **Schedule 7**.

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<sup>40</sup> See para 10.1.

## 11 EARLY NEUTRAL EVALUATION

- 11.1 The parties to a proceeding in the Commercial Court may by consent seek a without prejudice, confidential and non-binding early neutral evaluation ('evaluation') of the proceeding or of one or more questions in the proceeding with a view to assisting them to resolve by agreement those questions or the proceeding as a whole.
- 11.2 Parties applying for an evaluation must provide to the List Judge a written statement identifying precisely the matter sought to be referred and recording the parties' consent to the procedure. If the List Judge considers that the matter identified is suitable for an evaluation, the List Judge will refer the request for evaluation to the Judge in charge of the Commercial Court. The Judge in charge of the Commercial Court will make the decision whether the matter will be referred to evaluation. In considering the request, the Judge may take into account availability of Court resources and Court allocations of time. The evaluation will not be conducted by the List Judge.
- 11.3 In requesting an evaluation, the parties are taken to agree that the evaluation will be a confidential process, and that unless otherwise agreed all aspects of the process will be without prejudice. Nothing said in or produced for the evaluation may be communicated or relied upon outside of the evaluation except as required by law.
- 11.4 The process and conduct of an evaluation will be in the discretion of the Judge or other person appointed by the Judge in charge of the Commercial Court to conduct the evaluation ('the evaluator') but, unless otherwise directed, the process will be as follows:
- 11.4.1 the parties must produce a common folder or folders of only the key documents which are necessary for the evaluation;
  - 11.4.2 each party must provide a written submission of no more than 10 pages on facts and law;
  - 11.4.3 the common folder(s) and written submissions must be provided on the date determined by the evaluator as notified to the parties;
  - 11.4.4 the evaluator will appoint a date to meet with the parties ('the hearing') to answer any questions which the evaluator may have or, at the evaluator's discretion, to hear any further submissions which a party may seek to make;
  - 11.4.5 the hearing with the evaluator will be held in private, must not exceed half a day and any further submissions must be confined to one hour for each party;

- 11.4.6 the evaluator may give an evaluation at the conclusion of the hearing or at such other time as the evaluator may determine and may do so orally or in writing at the discretion of the evaluator.
- 11.5 The parties may seek from the evaluator different and particular directions to suit the particular case, where the process and conduct described in paragraph 11.4 above would not be appropriate.
- 11.6 Parties seeking directions from the evaluator under paragraph 11.5 must each provide to the evaluator a written statement:
  - 11.6.1 identifying precisely the matters sought to be referred for evaluation;
  - 11.6.2 identifying precisely the particular directions sought for the process and conduct of the evaluation including:
    - 11.6.2.1 whether the parties propose to lead evidence and, if so, whether that is sought to be done orally, or in writing, and whether with, or without, cross-examination;
    - 11.6.2.2 the length of any oral hearing;
    - 11.6.2.3 whether the parties will seek to make submissions and, if so, the time limits to be imposed on any oral submissions or the page limits on any written submissions;
    - 11.6.2.4 whether the parties propose to provide key documents on which they rely;
    - 11.6.2.5 whether there will be any expert report; and
    - 11.6.2.6 whether the evaluator will be asked to provide a written evaluation.
- 11.7 The costs of an evaluation will be borne by the parties equally in the first instance unless otherwise agreed between them. The costs, however, may be included in the costs of the proceeding when these are determined.

## 12 PLEADINGS, PARTICULARS, DISCOVERY AND INTERROGATORIES

### *Pleadings*

- 12.1 Pleadings must focus on the real or substantial issues in dispute, supported by proper particulars. Prolix and irrelevant pleadings are likely to cause delays and unnecessary costs. Legal practitioners and parties responsible for the filing of pleadings of this nature are not acting in accordance with the Court Objective and may render themselves liable for costs and other sanctions under the Act.
- 12.2 Evasive pleading is also at odds with the Court Objective (with the same possible consequences as prolix and irrelevant pleadings) and will not be tolerated. Parties will be expected to join issue promptly in a responsive pleading. Holding defences are not acceptable.
- 12.3 Pleadings may be dispensed with where the Commercial Court considers that this would assist the Court Objective.
- 12.4 Judgment may be entered in default of pleading in accordance with paragraph 15.7.

### *Particulars*

- 12.5 Proper particulars should be provided in all pleadings as required by RSC Ch I r 13.10. A party in breach of this requirement may expect to be ordered to bear the costs of the request for and the provision of further and better particulars unless there is a proper basis for postponing the provision of the required particulars until discovery has occurred.

### *Discovery*

- 12.6 Parties are encouraged to agree upon orders for discovery and to consider whether limited categories of discovery should be exchanged.<sup>41</sup> The process of discovery does not affect the overarching obligation to disclose documents critical to the resolution of the dispute the subject of the proceedings under section 26 of the Act. Subject to any directions the List Judge may make, parties to a proceeding in the Commercial Court are to be taken to be subject to a direction from the Court to disclose documents in accordance with section 26 of the Act at the earliest reasonable time after the person becomes aware of the existence of the document.
- 12.7 Parties are expected to comply with the following procedures:
- 12.7.1 discovery is made pursuant to an order of the Court, not by notice for discovery;

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<sup>41</sup> See RSC O29.05 which provides for orders limiting discovery; and see ALRC Report 115, *Managing Discovery*, Chapter 6.

- 12.7.2 Discovery is normally made by the filing and delivery of a list of discoverable documents;
- 12.7.3 Where appropriate, discovery should be made in electronic form in compliance with Practice Note No 1 of 2007 – *Guidelines for the Use of Technology in any Civil Litigation Matter*;
- 12.7.4 The list of discoverable documents should include the following descriptive identifying fields:
- 12.7.4.1 **document discovery number** (using numeric, not alphabetical, numbering, for example, 001, 002, 003 etc, and where extra documents are to be inserted in a list, the numeric numbering should read, for example, 010.1, 010.2, 010.3 etc);
- 12.7.4.2 **document date**;
- 12.7.4.3 **document description** (including identifying documents as copies or originals for example, original contract between X and Y);
- 12.7.4.4 **document source or provenance** (for example, the particular file and from which party a document was discovered or from what person the document was obtained under subpoena).
- 12.7.5 The List Judge may decide that an order should be made specifying the maximum costs that may be recovered on a party and party basis with respect to discovery, or a particular aspect of the discovery process.<sup>42</sup> The parties should be ready to address these issues when discovery issues are being considered by the Court

### ***Interrogatories***

- 12.8 Service of interrogatories is not permitted in the Commercial Court other than in exceptional circumstances and, in any event, only with the leave of the List Judge. If an application for leave to serve interrogatories is made, it must be supported by an affidavit setting out the circumstances relied on and exhibiting a draft of the proposed interrogatories. Leave to serve interrogatories will normally only be given if they are required to establish some fact or facts which cannot satisfactorily

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<sup>42</sup> As to the power to cap the costs of or in relation to discovery, see *Supreme Court Act 1986*, s24; and see RSC, Chapter I, O63.02 and 63.03; See also, Australian Law Reform Commission (ALRC), *Managing Discovery: Discovery of Documents in Federal Courts* (ALRC Report, No 115, ALRC, 25 May 2011) paras 9.37 to 9.49

be proved in some other way. As an alternative to interrogatories, the Court may order the provision of further particulars or the early exchange of witness statements.

## 13 EVIDENCE AT TRIAL

### *Court Books*

- 13.1 The parties may, at the discretion of the List Judge, be directed to prepare a Court Book of documents for use at the trial. If preparation of a Court Book is not ordered, documents sought to be relied upon will need to be proved and tendered in the usual way. Parties will be expected to agree to the tender of documents where their authenticity and relevance is not in question. In lieu of or in addition to the provision of a Court Book the List Judge may at any time order the provision of any document or documents which appear, on the basis of party submissions or otherwise, to be critical to the proceeding.
- 13.2 The purpose of a Court Book is to provide to the Court, the parties and witnesses an accessible bundle of the documents which will be deployed at trial (also sometimes referred to as “a library”). A Court Book and all or any of the documents contained within it will not stand as evidence in a proceeding unless the List Judge so orders.
- 13.3 As a general principle, a Court Book will include, together with the current pleadings, requests for particulars and particulars, notices to admit and notices of dispute (or a summary of admissions), a legible copy of all documents in date order which any party intends to tender in evidence in chief or reasonably expects to refer to in cross-examination (the relevance test). Parties must ensure that, as far as possible, all such documents are included in the Court Book and that unnecessary documents are not included. Where a Court Book has been ordered, an application to tender a document in evidence will not be refused only by reason of the fact that it was omitted from the Court Book.
- 13.4 The contents of a Court Book will be inclusive; parties have an entitlement to add documents into the book provided each document satisfies the relevance test, but not to insist that another party excludes documents from the Court Book.
- 13.5 Where any dispute as to a Court Book arises between the parties, the matter should be listed before the List Judge or List Associate Judge without delay.
- 13.6 The attention of practitioners is drawn to paragraph 14.12 below, under which a document in a Court Book may be tendered as authentic without formal proof unless a party objects. If it is intended that a document be treated otherwise, this should be identified and any agreement as to this clearly recorded.
- 13.7 A Court Book should contain no unnecessary duplication of documents.
- 13.8 E-mail chains should be avoided and e-mail messages should be included once each as single messages, unless the associated chain has evidentiary significance.

- 13.9 Parties should expect that, where unnecessary or irrelevant documents are included in a Court Book, an order may be made that the costs associated with the inclusion of such documents not be recoverable by the party that included those documents or that the costs be paid by that party in any event.
- 13.10 A Court Book must contain an index of its contents:
- 13.10.1 Each page of a Court Book must be numbered sequentially;
  - 13.10.2 The index will normally list the documents in chronological order. Where an affidavit is included in a Court Book, the exhibits must be included in the chronological order of the exhibits themselves and not as if they came into existence only at the time the affidavit was sworn;
  - 13.10.3 The index must include at least the following descriptive identifying fields:
    - 13.10.3.1 Court Book document number;
    - 13.10.3.2 document date (as set out in the list of discoverable documents if the document was discovered);
    - 13.10.3.3 document description (as set out in the list of discoverable documents if the document was discovered);
    - 13.10.3.4 document source or provenance (as set out in the list of discoverable documents if the document has been discovered);
    - 13.10.3.5 Court Book page number at which the document commences; and
    - 13.10.3.6 Court Book page number at which the document ends.
  - 13.10.4 Ordinarily, documents in the Court Book should not be separated by dividers.

### ***Witness Statements and Witness Outlines***

- 13.11 A party seeking to utilise a witness statement for the purpose of leading evidence in chief will be required to satisfy the List Judge that this course will better achieve the Court Objective than if evidence were to be given *viva voce* (orally) in the usual way. Generally, the use of a witness statement will not be appropriate where the evidence sought to be led concerns a significant contested issue of fact where the recollection of the witness with respect to that issue is in question; and the same applies where the credit of the witness is in question. In any event these are



matters going to the discretion of the List Judge in the particular circumstances. The List Judge may order that witness statements be provided by only some of the witnesses to be relied upon in a proceeding and, additionally, may order that only part of the evidence in chief of a witness be provided by way of witness statement.

- 13.12 Where a witness has not been permitted to provide evidence in chief by witness statement, in whole or in part, the List Judge may order the provision of a brief written outline of the evidence that witness will give (“a witness outline”), to the extent that it has not been permitted by witness statement.
- 13.13 A witness outline must clearly identify the topics in respect of which evidence will be given and the substance of that evidence. A witness outline must be directed only to matters in issue.
- 13.14 Where a witness outline is ordered the List Judge may also order that no party may use any part of the contents of that document for the purpose of cross examination of the person providing the witness outline or any other person unless leave is granted by the List Judge. Nevertheless, this does not prevent a person cross examining any such person in relation to any act, fact, matter or thing referred to in the witness outline.
- 13.15 Any witness outlines should also be provided to the parties and to the List Judge in electronic format.
- 13.16 A witness statement is in written form the evidence that a witness would otherwise give orally and, subject to any contrary order, will when adopted stand as the evidence in chief of the witness. A witness statement and a witness outline (in the latter case allowing for its brevity and purpose, which is to outline evidence which a witness is expected to give to avoid another party being unfairly surprised) should be in a form which would satisfy the evidentiary requirements for the oral evidence of the witness.
- 13.17 Practitioners who draft witness statements or witness outlines (allowing for their brevity and purpose) should bear in mind that a witness statement or witness outline that is not written in the witness’s own words is unlikely to assist either the Commercial Court or the witness.
- 13.18 Witness statements should comply with the following requirements:
- 13.18.1 each witness statement must be in admissible form, in accordance with the rules of evidence, including the rules with respect to hearsay evidence, in accordance with the *Evidence Act 2008* (Vic);
- 13.18.2 each witness statement before it is filed or served must include at the end of the statement the following verification:

‘I verify that I have read the contents of this my witness statement and the documents referred to in it and that I am satisfied that this is the evidence in chief which I wish to give at the trial of the proceeding.’;

- 13.18.3 each witness statement must be directed only to matters in issue; and
- 13.18.4 copies of witness statements, as tendered, should also be provided to the parties and to the List Judge in electronic format.
- 13.19 A party will be taken to have waived, for the purpose of the proceeding, legal professional privilege to the content of a witness statement or witness outline which has been served in that proceeding. Legal professional privilege attaching to the content of an unserved draft witness statement, including an expert's witness statement, or witness outline is not taken to be waived merely by the filing and service of the final form of such witness statement or witness outline.
- 13.20 Subject to paragraph 13.13, a party may refer to or use the contents of a witness statement (or witness outline) served by another party before it is adopted by the intended witness and put into evidence (or the witness providing the witness outline gives evidence), for the purposes of the proceeding; for example, for the preparation of the case to be answered, in opening submissions and in adducing evidence from a witness.
- 13.21 A party receiving a witness statement or witness outline is taken to have done so subject to an implied undertaking to the Court that the witness statement and its contents will not be used for any purpose other than for the legitimate purposes of the proceeding.
- 13.22 Where a witness will prove or refer to a document, the witness statement or witness outline must, if the provision of a Court Book has been ordered, identify each such document by description and either by page number in the Court Book or, if the Court Book has not been prepared by the time of service of the witness statement or witness outline or no Court Book has been ordered, by discovery number. It would not, however, be expected that a witness outline would usually make extensive references to documents.
- 13.23 Where an order for witness statements or witness outlines is made, a party may not without leave adduce from the witness evidence in chief other than evidence included in the witness statement of that witness or, where the witness will not provide a witness statement, the evidence referred to in a witness outline to be given by the witness.

### ***Expert Evidence***

- 13.24 The List Judge may give directions that:

- 13.24.1 expert evidence at trial follow factual evidence upon which the expert evidence is predicated;
  - 13.24.2 two or more experts engaged by the respective parties be sworn and present their evidence concurrently; and may, if permitted by the List Judge and subject to any directions the Judge may give, question each other in relation to their evidence;
- 13.25 Where contentious expert evidence is to be adduced, the Commercial Court will almost invariably direct pursuant to RSC Ch I r 44.06 that experts confer before trial. Typical directions appear in **Schedule 8**.
- 13.26 Where a conference of experts is directed:
- 13.26.1 subject to any direction of the List Judge, the procedure adopted at the conference is a matter for the experts themselves, and not for the parties or their practitioners;
  - 13.26.2 neither the parties nor practitioners should seek to restrict the freedom of the experts at the conference to identify and acknowledge the matters upon which they agree; and
  - 13.26.3 following any conference, the experts must prepare a joint memorandum for the Court stating:
    - 13.26.3.1 the matters upon which they were directed to confer;
    - 13.26.3.2 that they have met and discussed each matter upon which they have been directed to confer;
    - 13.26.3.3 the matters on which they agree;
    - 13.26.3.4 the matters on which they disagree; and
    - 13.26.3.5 in brief summary the reasons for any disagreement.

## **14 SETTING DOWN FOR TRIAL AND CONDUCT OF TRIAL**

- 14.1 A proceeding may only be set down for trial by order. A typical form of trial order is set out in Schedule 9 [Witness Outlines Ordered] and Schedule 10 [Witness Statements Ordered].
- 14.2 The List Judge will consider whether the proceeding or any question in the proceeding should be referred for trial to an Associate Judge for hearing pursuant to RSC Ch I r 77.05.
- 14.3 The List Judge or the List Associate Judge may order pursuant to RSC Ch I r 47.04 that a separate question be the subject of a preliminary trial and may give directions accordingly. Questions as to the quantum of damages will ordinarily be tried after all other questions in the proceeding.
- 14.4 The Commercial Court will facilitate early hearings and, for this purpose, may place an appropriate proceeding on standby for a particular date when time might become available.
- 14.5 Parties should expect that a trial fixed for hearing will commence on the date fixed and that a trial which is not finished within the estimated duration will be adjourned part-heard to the next date convenient to the Commercial Court.
- 14.6 Practitioners for parties other than the plaintiff should expect to be required to make an opening statement after the plaintiff's opening.
- 14.7 Where necessary to achieve the Court Objective, the List Judge may limit the number of witnesses (including expert witnesses) that each party may call and the time to be taken at trial by each party including the time for cross-examination and for opening and closing addresses.
- 14.8 If the pleadings or particulars have been amended after the preparation of the Court Book the legal practitioner for the plaintiff must, at the conclusion of the trial, file and serve an up to date copy of all pleadings including particulars.
- 14.9 Where a Court Book is not ordered, a party must provide a working copy for the List Judge of any exhibit tendered at trial, together with a working copy of the current pleadings.
- 14.10 The practices set out in this chapter are in addition to those available under RSC Ch I or at law and, in each case, subject to any direction of the List Judge.

- 14.11 During the opening of their case practitioners are expected to identify the critical documents in the proceeding.<sup>43</sup>
- 14.12 The List Judge may direct that the parties identify in their closing submissions documents and any other evidence relied upon and the basis upon which it is relied upon. It follows that the List Judge may treat evidence not so identified as irrelevant to the issues to be determined.
- 14.13 A document in the Court Book may be tendered without formal proof and will be accepted in evidence as an authentic document unless objection to the tender is taken<sup>44</sup> or the parties have otherwise agreed.<sup>45</sup>

### *Use of Authorities at Trial*

- 14.14 The attention of practitioners is drawn to Practice Note No 1 of 2006, dealing with the citation of unreported judgments.
- 14.15 Parties must consult to eliminate duplication in copies of reports of authorities provided to the Commercial Court. Costs for excessive photocopying will not be allowed. Parties should, where possible, restrict copying to the part or parts of each case report relevant to the issues in the proceeding.
- 14.16 Parties should not hand up case reports that group all references in end-notes but instead provide the Commercial Court with reports that give references in the text or in footnotes on each page. For reports taken from the Austlii website when an authorised report is not available, parties should follow the Download link at the top of the report and select Rich Text Format where available.

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<sup>43</sup> As to the overarching obligation to disclose the existence of documents, see *Civil Procedure Act 2010*, s26.

<sup>44</sup> As to the evidentiary consequence of this see *Evidence Act 2008* (Vic), s 60.

<sup>45</sup> See para 13.7.

## **15 ORDERS AND JUDGMENTS**

- 15.1 Practitioners should prepare draft orders for all hearings in the List where orders are sought.
- 15.2 It is not necessary to reserve liberty to apply in any interlocutory order made in a Commercial Court proceeding. Liberty to apply is implied in all orders and, in any event, parties are encouraged to communicate with the associate to the List Judge as soon as it becomes clear that there are any difficulties with compliance with orders so that a further directions hearing can be scheduled and such other action taken as the List Judge may decide.
- 15.3 As a general rule, orders will be authenticated pursuant to RSC Ch I r 60.02.
- 15.4 The Registry aims to send to each of the parties authenticated orders within five working days of their receipt from the associate.
- 15.5 If a party fails to comply with an order, the Commercial Court may, in addition to any course otherwise available, impose a costs penalty on that party or the practitioner representing that party, refuse to extend the time for compliance but require the party in default to catch up with the remaining timetable, or it may remove the proceeding from the Commercial Court.
- 15.6 Where a party is experiencing difficulties in meeting a timetable, the problem should be immediately notified to the associate of the List Judge or Associate Justice who set the timetable so that the difficulties can be properly managed and consequential delays avoided or minimised.
- 15.7 Judgment may be entered administratively in a Commercial Court proceeding in accordance with the RSC but before judgment is entered the Commercial Court Registrar will liaise with the List Judge.

## **16 APPEAL**

16.1 The attention of practitioners is drawn to the Rules of Court relating to appeals from judgments given or orders made by Associate Judges and, in particular, to the restriction on the right of appeal contained in:

16.1.1 RSC Ch I r 77.06(2) and r 77.06(2.1); and

16.1.2 RSC Ch V r 16.5.

16.2 An appeal pursuant to RSC Ch I r 77.06 from any judgment given or order made by an Associate Judge in a proceeding allocated to a list will normally be heard by the Judge assigned to that list.

## 17 MISCELLANEOUS

17.1 This Practice Note supersedes the following Practice Notes, Notices to Practitioners and Notices to the Profession which are hereby revoked:

Notice to Practitioners No 1 of 2004 – Victorian Taxation Appeals

Notice to Practitioners No 2 of 2004 – Victorian Taxation Appeals

Notice to Practitioners No 3 of 2007 – Victorian Taxation Appeals

Practice Note No 4 of 2004 – Commercial List Practice Note (Green Book), as amended by Practice Note No 6 of 2007

Notice to the Profession 2008 – Commercial Court

Notice to the Profession No 2 of 2009 – Associate Judges

Notice to the Profession No 3 of 2009 – Transfer of Cases into the Commercial Court

Notice to the Profession No 4 of 2009 – Urgent and Interlocutory Applications

Notice to the Profession No 5 of 2009 – Witness Statements

Notice to the Profession No 6 of 2009 – Communications with Associates

Notice to the Profession No 7 of 2009 – Judge in Charge

Notice to the Profession No 8 of 2009 – ADR

Notice to the Profession No 9 of 2009 – Case Management Conferences

Notice to the Profession No 10 of 2009 – ENE

Notice to the Profession No 11 of 2009 – Taxations Cases – List F

17.2 Only Chapters 1 to 7 and paragraph 8.6 of this Practice Note apply to Corporations proceedings which will be conducted in accordance with RSC Ch V.

17.3 Subject to this Practice Note:

17.3.1 RSC Ch I applies to all proceedings;

17.3.2 RSC Ch II O 2 applies to Commercial proceedings;

17.3.3 RSC Ch II O 9 applies to Arbitration proceedings;



- 17.3.4 RSC Ch II O 7 applies to Taxation appeals.
- 17.4 Parties and practitioners are referred to the following Practice Notes:
  - 17.4.1 Practice Note No 4 of 1999 – Supreme Court Divisional List;
  - 17.4.2 Practice Note No 3 of 2002 – Transcript in Civil Proceedings;
  - 17.4.3 Practice Note No 2 of 2010 – Arbitration Business;
  - 17.4.4 Notice to Profession 2006 – Applications pursuant to s 588FF of the *Corporations Act 2001* (Cth);
  - 17.4.5 Practice Note No 1 of 2007 – *Guidelines for the Use of Technology in any Civil Litigation Matter*.

## SCHEDULE 1

### HEADING TO PROCEEDINGS IN THE COMMERCIAL COURT

See para 3.8

[Non-Corporations Proceeding]

IN THE SUPREME COURT OF VICTORIA AT MELBOURNE  
COMMERCIAL AND EQUITY DIVISION  
COMMERCIAL COURT

LIST XX  
S CI 2010

BETWEEN:

#

Plaintiff

- and -

#

Defendant

-----  
[Corporations Proceeding]

IN THE SUPREME COURT OF VICTORIA AT MELBOURNE  
COMMERCIAL AND EQUITY DIVISION  
COMMERCIAL COURT

LIST XX  
S CI 2010

IN THE MATTER OF XY Pty Ltd (ACN 111 111 111)

BETWEEN:

#

Plaintiff

- and -

#

Defendant

**SCHEDULE 2**  
**CASE MANAGEMENT INFORMATION SHEET**

(including standard mediation order)

See para 7.6

***The information supplied should be printed in bold characters and provided to the List Judge with the Case Management Bundle***

[Proceeding Heading]

Party lodging information sheet:

Name of solicitors:

Name(s) of advocates for trial:

1. By what date can you give discovery of the following:
  - (a) the documents on which you will rely;
  - (b) documents which:
    - adversely affect your case;
    - adversely affect another party's case;
    - support another party's case; and
2. Do you contend that discovery of any category or class of document would be unreasonable? If so, what is the category or class and on what grounds do you so contend?
3. Is specific discovery required on any issue? If so, please specify.
4. By what dates can you –
  - (a) give general inspection; and
  - (b) any and if so what preliminary inspection?
5. Do you propose amendments to a pleading or a request for particulars? Are any requests for particulars outstanding? Please give brief details of what is proposed, required and outstanding?
6. Can you make any additional admissions? If yes, please give brief details of the additional admissions.

7. Are any of the issues in the proceeding suitable for trial as preliminary issues?
8. Witnesses and evidence
  - (a) How many witnesses of fact do you propose to call to give evidence at trial? Please give their names and topics of evidence.
  - (b) Will an interpreter be required for any witness?
  - (c) Do you wish any witness to give oral evidence by video link? Please give his or her name, or explain why the name is not given. Please state the country and city from which the witness will be asked to give such evidence.
  - (d) Do you intend to apply at the Case Management Conference that the evidence of any witness of fact be given by a signed witness statement and if so:
    - (i) give the name of each such witness;
    - (ii) state briefly the issues which the witness statement is expected to cover;
    - (iii) state why the evidence is sought to be given by witness statement rather than *viva voce* (orally) with a witness outline and how it will facilitate the management of the trial.
  - (e) What documents can be tendered in evidence at trial as an agreed common bundle without the need for formal proof?
9. Expert evidence
  - (a) On what issues may expert evidence be required?
  - (b) Is this a proceeding in which the use of a joint expert might be suitable?
  - (c) On the evidence of how many expert witnesses do you propose to rely at trial? Please give their names, or explain why the name is not given. Please identify each expert's field of expertise.
  - (d) By what date can you serve signed expert reports?
  - (e) When will your experts be available for a meeting or meetings of experts?
  - (f) How many of your expert witnesses do you propose should give oral evidence in chief at trial? Please explain why?

- (g) Do you wish any expert witness to give evidence by video link? Please give his or her name, or explain why this is not being done. Please state the country and city from which the witness will be asked to give evidence by video link.
10. What are the advocates' present provisional estimates of the minimum and maximum lengths of the trial?
11. What is the earliest date by which you believe you can be ready for trial?
12. Is this a proceeding in which a pre-trial review is likely to be useful?
13. Is there any way in which the Court can assist the parties to resolve their dispute or particular issues without the need for a trial or a full trial?
14. Alternative dispute resolution
- (a) Might some form of Alternative Dispute Resolution procedure assist to resolve or narrow the dispute or particular issues?
- (b) Has your client been informed of the range of available Alternative Dispute Resolution options?
- (c) Have you discussed Alternative Dispute Resolution options with the other parties in the proceeding?
- (d) Do you request that the proceeding be adjourned while the parties try to settle the proceeding by means of one or other Alternative Dispute Resolution option?
- (e) Are any other special directions needed to allow for Alternative Dispute Resolution?
15. What interlocutory applications do you anticipate might be made before trial?
16. Does provision need to be made in the pre-trial timetable for any other procedural step not otherwise dealt with above? If yes, please specify the application or procedural step.
17. Are there, or are there likely in due course to be, any related proceedings? Please give brief details.

[Signature of solicitors]

**SCHEDULE 3**  
**PRE-TRIAL CHECKLIST**

See paras 7.17, 8.13 and Sch 9 para 27

*(Information supplied should be in bold characters)*

[Proceeding Heading]

- (a) Trial date:
- (b) Party lodging checklist:
- (c) Name of solicitors:
- (d) Name of barristers:

[Note: this checklist should be completed with the involvement of counsel instructed for trial]

1. Have you completed preparation of a Court Book (if a Court Book has been ordered) in accordance with all relevant directions?
2. If not, when will the preparation be completed?
3. Which witnesses of fact do you intend to call?
4. Which expert witnesses do you intend to call?
5. Will an interpreter be required for any witnesses and if so, have any necessary directions already been given?
6. Have directions been given for any witnesses to give evidence by video link? If so, have all necessary arrangements been made?
7. What are counsels' confirmed estimates of the length and minimum lengths of the trial?  
You are required to attach a confirmed estimate of the length signed by each counsel.

\_\_\_\_\_  
Solicitors for the Plaintiff/s

\_\_\_\_\_  
Solicitors for the Defendant/s

**SCHEDULE 4**  
**STANDARD VALUATION ORDER**

See para 8.6

[PROCEEDING HEADING]

**ORDER**

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JUDGE:	The Honourable Justice/Associate Justice #
DATE MADE:	#
ORIGINATING PROCESS:	#
HOW OBTAINED:	#
ATTENDANCE:	#
OTHER MATTERS:	#

THE COURT ORDERS THAT:

1. An independent person ('the Valuer') be appointed to express an opinion as to the value of the shares of # ('the Company').
2. The Valuer be a person agreed upon by the parties by 4.00 pm on # .
3. Pursuant to s.247A of the *Corporations Act 2001* (Cth), the Plaintiff and one representative of each of his or her legal and accounting advisers is authorised to inspect the books of the Company (as that term is defined in s.9 of the *Corporations Act 2001* (Cth)).
4. The defendant by its officers and employees, including #, must make the books of the Company available for inspection and copying in accordance with paragraph 3 of these orders between the hours of 9.00 am and 5.00 pm commencing on # and ending on #.
5. The Plaintiff provide to the Valuer a copy of each document which the parties or either of them wish the Valuer to see for the purposes of the valuation by 4.00 pm on #.
6. Any submission which either party wishes to make to the Valuer be in writing and provided to the Valuer and to the other party by 4.00 pm on #.

7. The Valuer may inspect all or any of the books of the company (as the term 'books' is defined in s.9 of the *Corporations Act 2001* (Cth)) for the purposes of the valuation.
8. Each party must comply with the reasonable requests of the Valuer, including for the provision of any information or documents including copy documents, as soon as reasonably practicable after the making of such a request.
9. The Valuer must complete the valuation and provide a copy to the parties and the Court by 4.00 pm on #.
10. The parties pay the costs of the Valuer in equal shares in the first instance.
11. The further hearing of the summons for directions is adjourned to #.
12. Liberty to apply is reserved to the parties and the Valuer on reasonable notice.
13. Costs reserved.

DATE AUTHENTICATED:

**PROTHONOTARY**



## **SCHEDULE 5**

### **MATTERS FOR CONSIDERATION AT A FINAL DIRECTIONS HEARING**

See para 8.13

1. Confirmation that the parties will be ready for trial on the appointed trial date and that the estimated trial duration remains accurate.
2. The order of opening submissions by all parties prior to evidence from witnesses.
3. The length of opening submissions.
4. The filing and service of agreed statements of facts.
5. The filing and service of an agreed statement on any expert evidence, identifying the issues which remain in dispute between the parties' experts.
6. Where witness statements have been ordered or affidavits are to be relied upon, the procedure for and time for notices of objection to evidence and responses.
7. The exchange of written outlines of opening submissions.
8. The exchange of written outlines of closing submissions.
9. Time limits to be imposed on parties for:
  - (a) opening addresses;
  - (b) presentation of a party's case including cross-examination; and
  - (c) closing addresses.
10. The mode of proof of any particular facts in dispute.

**SCHEDULE 6**  
**STANDARD MEDIATION ORDER**

See para 10.3

[PROCEEDING HEADING]

**ORDER**

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JUDGE:	The Honourable Justice/Associate Justice #
DATE MADE:	#
ORIGINATING PROCESS:	#
HOW OBTAINED:	#
ATTENDANCE:	#
OTHER MATTERS:	#

THE COURT ORDERS THAT:

1. The proceeding be referred to a Mediator to be agreed between the parties or in default of agreement to be appointed by the Court, such mediation to take place by/not to take place before #.
2. Subject to the terms of this order, the solicitor for the Plaintiff must, after consultation with all parties, deliver to the Mediator a copy of this order, all pleadings (including requests for and further particulars) and a copy of any other relevant information, and take all steps necessary to ensure that the mediation commences as soon as practicable.
3. The mediation must be attended by those persons who have the ultimate responsibility for deciding whether to settle the dispute and the terms of any settlement and the lawyers who have ultimate responsibility to advise the parties in relation to the dispute and its settlement.
4. The Mediator not later than # report back to the Court whether the mediation is finished.
5. Subject to any further order, the costs of the mediation be paid in the first instance by the parties in equal shares.

## **SCHEDULE 7**

### **STANDARD REFERENCE TO SPECIAL REFEREE**

See para 10.6

[PROCEEDING HEADING]

#### **ORDER**

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JUDGE:	The Honourable Justice/Associate Justice #
DATE MADE:	#
ORIGINATING PROCESS:	#
HOW OBTAINED:	#
ATTENDANCE:	#
OTHER MATTERS:	#

1. Pursuant to RSC Ch I r 50.01(1)(b) it is ordered that the questions set out in Annexure 1 [or as the case may be] be referred to a Special Referee.
2. # is nominated as the Special Referee.
3. The Special Referee may indicate the acceptance of the nomination by filing with the Prothonotary, within 7 days of the date of this Order, a written consent to act. The Special Referee must thereupon deliver to each of the parties a copy of the consent to act and a statement of proposed remuneration for so acting.
4. Subject to the filing by the nominee of a written consent to act as Special Referee under this Order, and provided no party objects to the proposed remuneration within 7 days after the date of the filing of the consent to act, the nominee is appointed as the Special Referee under this Order such appointment to be effective on the date of the filing of the consent to act.
5. The Special Referee must make a report in writing to the Court on each of the questions. The report must state the opinion of the Special Referee upon each of the questions

giving reasons for this opinion. The report together with a copy for each of the parties must be delivered to the Prothonotary not later than # or by such later date as the Court may direct.

6. Within 14 days after the date of the filing of the consent to act the parties must provide security for the payment of the remuneration of the Special Referee by the payment into court or if all parties agree in writing by payment into an interest bearing account in the names of the solicitors for the parties. The amount of security will be the amount proposed by the Special Referee or such other sum as the Court may from time to time direct. In the event that this direction be not complied with the reference will be stayed pending further order.
7. Security for the payment of the remuneration of the Special Referee be provided in the first instance in equal shares by the parties. All other questions as to the remuneration of the Special Referee, including its final determination and which party or parties should ultimately bear it, be reserved.
8. The sum provided by way of security for the remuneration of the Special Referee, including interest, be not disbursed otherwise than pursuant to an order of the Court.
9. At the time of giving the report pursuant to this Order the Special Referee must deliver to each of the parties a signed memorandum setting out the remuneration claimed including any disbursements and file a copy with the Court.
10. Each of the parties and the Special Referee have liberty to apply.
11. Costs of this application be reserved.

## **ANNEXURE 1 - QUESTIONS REFERRED**

# INSERT QUESTION(S)#

**ANNEXURE 2 - CONDUCT OF THE REFERENCE**

1. The following directions are given pursuant to RSC Ch I r 50.02:
2. Subject to the requirements of the rules of natural justice and the following directions and any further directions which may be given by the Court, the Special Referee may conduct the reference in such manner as is appropriate for the efficient and economical implementation of this Order.
3. Within 21 days after the date of appointment the Special Referee must conduct a preliminary conference with the parties or their legal representatives to determine the manner of conducting the reference.
4. The Special Referee is authorised for the purposes of the reference to have and use the following material in addition to any material which may be tendered and received as evidence in the reference:
  - (i) a copy of this Order;
  - (ii) a copy of the pleadings including any particulars;
  - (iii) the following exhibits tendered at the trial:  
Ex .....

A copy of each of the above must be delivered to the Special Referee by the plaintiff within 14 days after the date of appointment.
5. The Special Referee may make such enquiry and inspection of any document or thing and apply such personal knowledge and expertise as is reasonably necessary for the purpose of the reference.
6. The Special Referee is not bound by the rules of evidence.
7. The attendance of witnesses and the production of documents may be compelled by the issue of subpoena in accordance with RSC Ch I O 42.
8. Each of the parties must comply with any lawful direction that the Special Referee considers necessary for the reference.

9. Where a party wishes to rely upon the opinion of an expert the Special Referee may direct that a copy of the expert's opinion and the reasons in support be provided to the other parties and may direct that the experts meet in the absence of the Special Referee and the parties with a view to settling any points of difference between them and to presenting a joint report for use in the reference. Except as all the parties whose experts have participated in such a meeting in writing agree, no evidence may be admitted in the reference or otherwise in this proceeding of anything said or done at the meeting.
10. The parties may be represented on the reference by legal practitioners.
11. The Special Referee may administer an oath or take an affirmation for the purpose of the reference.

**SCHEDULE 8**  
**STANDARD JOINT EXPERTS ORDER**

See para 13.23

[PROCEEDING HEADING]

**ORDER**

---

JUDGE: The Honourable Justice/Associate Justice #

DATE MADE:

ORIGINATING PROCESS:

HOW OBTAINED:

ATTENDANCE:

OTHER MATTERS:

THE COURT ORDERS THAT:

1. On or before #, each of the Plaintiff and the Defendants must nominate an expert ('the experts') and provide that expert with a copy of the Expert Witness Code of Conduct ('the code').
2. The parties each provide the experts with copies of or access to all documents, and any other information, requested by the experts to complete their joint report referred to below.
3. By #, the experts confer and provide to the Court and to the parties a joint report ('the joint report') containing their joint opinion as to each of the following questions:

#INSERT QUESTIONS#

4. If the experts are unable to express a joint opinion on any question, the joint report must describe the difference(s) between the opinions and set out their respective reasons for disagreeing.
5. The experts' conference is intended to be a consultation of experts without any influence from a party to the proceeding. To that end, subject to paragraph 6:
  - (a) The conference of experts and all further communications between them in relation to the preparation of the joint report must be conducted in the absence of the parties, their employees or agents, or any practitioner for or associated with any party;
  - (b) None of the experts may in the preparation of the joint report consult with any party, their employees or agents, or any practitioner for or associated with any party; and
  - (c) Notwithstanding (a) and (b) the experts may jointly request further information or direction by letter signed by them directed to the practitioner for each of the parties and may receive such further information.
6. Save as contained in the joint report, unless the parties agree in writing no evidence may be admitted of anything said or done by any person at the conference between the experts.



## SCHEDULE 9

### TYPICAL FORM OF TRIAL ORDER - WITNESS OUTLINES ORDERED

See para 14.1

[PROCEEDING HEADING]

#### ORDER

---

JUDGE:	The Honourable Justice/Associate Justice #
DATE MADE:	#
ORIGINATING PROCESS:	#
HOW OBTAINED:	#
ATTENDANCE:	#
OTHER MATTERS:	#

THE COURT ORDERS THAT:

#### **Trial date**

1. The proceeding is set down for trial and fixed for hearing on # on an estimated duration of # days.

#### **Critical Documents**

2. The parties' list of critical documents disclosed pursuant to section 26 of the *Civil Procedure Act 2010* (Vic) to be filed and served on or before #.

#### **Discovery**

3. The plaintiff's list of discoverable documents be filed and served on or before #.
4. The defendant's list of discoverable documents be filed and served on or before #.
5. Inspection of discovered documents be completed by #.

#### **Mediation**

6. See **Schedule 6** – standard mediation order

#### **Court Book [only if Court Book ordered]**

7. The Plaintiff prepare a Court Book containing the following documents:
  - (a) the current pleadings including requests for and particulars;

- (b) all documents, in date order, which any party expects to tender in evidence in chief or to be referred to in cross-examination.
- 8. The plaintiff by # serve on each other party a draft index for the proposed Court Book. Each of those other parties must send a list of documents to be included or documents to be excluded from the proposed Court Book and all parties must consult as to and agree upon the contents of the Court Book by #.
- 9. The plaintiff by # serve on each other party and file for the use of the judge a copy of the Court Book. The plaintiff must also provide the judge with the index to the Court Book in electronic form.

### **Witness Outlines**

- 10. Subject to any order of the trial judge, evidence in the trial be *viva voce* with the parties providing a witness outline for each witness they intend to call.
- 11. The plaintiff file and serve its witness outlines by 4:00 pm on #.
- 12. The defendant file and serve its witness outlines by 4:00 pm on #.
- 13. Each party have available for use by the trial judge a copy of all its witness outlines in paper form and in electronic form.
- 14. Each witness outline must satisfy the following formal requirements:
  - (a) it should be set out in numbered paragraphs;
  - (b) it should be a brief outline of the evidence the witness will give; and  
it should refer to evidence only in admissible form.
- 15. The content of a witness outline served pursuant to an order of the Court is subject to the same implied undertaking as to confidentiality as applies to a document produced upon discovery.
- 16. No person may use any part of the contents of a witness outline for the purposes of cross examination of the person providing the witness outline or any other person without leave of the List Judge.

17. The plaintiff have available at the hearing a further copy of documents tendered in evidence [**or the Court Book if ordered**] for the exclusive use of witnesses during their examination.
18. The plaintiff file and serve a chronology of the relevant facts and events by 4:00 pm on #.
19. The parties file and exchange written outlines of opening submissions, limited to # A4 pages, 1.5 spaced text in a common font style, size 12, by 4:00 pm on #.

#### **Pre-trial checklist**

20. Each party must send to the associate to the List Judge (with a copy to each other party) a completed pre trial checklist<sup>46</sup> on or before #.

#### **Counsels' joint estimate of trial duration**

21. Counsel for the parties must provide to the List Judge a joint memorandum, signed by all counsel, containing a detailed estimate of the duration of the trial, broken down as follows:
  - (a) time in opening submissions of each party;
  - (b) time for any objections to evidence;
  - (c) time for the evidence of each witness;
  - (d) time for final submissions of each party.

The estimate is to be in two parts:

- (a) on the assumption that the trial proceeds on all issues, including quantification of damage;
- (b) on the assumption that the trial proceeds on liability issues only, excluding any issues concerning quantification of damage.

If there is any disagreement between counsel, this should be stated in the joint memorandum and the rival positions or estimates set out.

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<sup>46</sup> See Schedule 3.

22. The joint memorandum is to be filed by email to the associate to the List Judge by 4:00 pm on #.
23. If, after the report is delivered, a barrister or solicitor for a party has reason to believe that the information provided is no longer accurate, it is the responsibility of that lawyer to bring this to the attention of the List Judge immediately.
24. Costs are reserved.

## SCHEDULE 10

### TYPICAL FORM OF TRIAL ORDER - WITNESS STATEMENTS ORDERED

See para 14.1

[PROCEEDING HEADING]

#### ORDER

---

JUDGE:	The Honourable Justice/Associate Justice #
DATE MADE:	#
ORIGINATING PROCESS:	#
HOW OBTAINED:	#
ATTENDANCE:	#
OTHER MATTERS:	#

THE COURT ORDERS THAT:

#### **Trial date**

1. The proceeding is set down for trial and fixed for hearing on # on an estimated duration of # days.

#### **Critical Documents**

2. The parties' list of critical documents disclosed pursuant to section 26 of the *Civil Procedure Act 2010* (Vic) to be filed and served on or before #.

#### **Discovery**

3. The plaintiff's list of discoverable documents be filed and served on or before #.
4. The defendant's list of discoverable documents be filed and served on or before #.
5. Inspection of discovered documents be completed by #.

#### **Mediation**

6. See **Schedule 6** – standard mediation order

**Court Book [only if Court Book ordered]**

7. The Plaintiff prepare a Court Book containing the following documents:
  - (c) the current pleadings including requests for particulars and particulars;
  - (d) all documents, in date order, which any party expects to tender in evidence in chief or to be referred to in cross-examination.
8. The plaintiff by # serve on each other party a draft index for the proposed Court Book. Each of those other parties must send a list of documents to be included or documents to be excluded from the proposed Court Book and all parties must consult as to and agree upon the contents of the Court Book by #.
9. The plaintiff by # serve on each other party and file for the use of the judge a copy of the Court Book. The plaintiff must also provide the judge with the index to the Court Book in electronic form.

**Witness statements**

10. Subject to any order of the trial judge, evidence in the trial be by witness statement.
11. The plaintiff file and serve its witness statements by 4:00 pm on #.
12. The defendant file and serve its witness statements by 4:00 pm on #.
13. Each party have available for use by the trial judge a copy of all its witness statements in paper form and in electronic form.
14. Each witness statement satisfy the following formal requirements:
  - (c) it should be set out in numbered paragraphs;
  - (d) as far as possible, it should be expressed in the witness's own words;
  - (e) it should contain evidence only in admissible form. For example, hearsay should be avoided;
  - (f) where the witness statement contains conversations these should, if the witness's recollection permits, be expressed in direct speech. If this is not possible, this fact should be stated and the witness's best recollection or the substance of the conversation may be set out;

(g) it should contain at the end of the statement the following verification:

‘I verify that I have read the contents of this my witness statement and the documents referred to in it and that I am satisfied that this is the evidence in chief which I wish to give at the trial of the proceeding.’

15. Where the statement of the witness, if admitted in evidence, proves a document, a copy of the document may be annexed to the witness statement or the document may be identified and tendered separately whether in the Court Book **[if a Court Book has been ordered]** or otherwise.
16. The content of a witness statement served pursuant to an order of the Court is subject to the same implied undertaking as to confidentiality as applies to a document produced upon discovery.
17. Where any witness is not willing to provide a witness statement, the party calling the witness must, by the date fixed for the delivery of the witness statement of that witness, file and serve a statement of the substance of the evidence which the party expects that witness to give and will be entitled to lead oral evidence in chief from that witness.
18. The plaintiff have available at the hearing a further copy of the documents tendered in evidence **[or the Court Book if ordered]** for the exclusive use of witnesses during their examination.
19. The plaintiff file and serve a chronology of the relevant facts and events by 4:00 pm on #.
20. The parties file and exchange written outlines of opening submissions, limited to # A4 pages, 1.5 spaced text in font size 12, by 4:00 pm on #.
21. Any party receiving a witness statement may, not less than # working days before the witness is due to give evidence, give notice to the party proposing to call the witness stating:
  - (a) that a specified part of the witness statement is objected to as being inadmissible;

- (b) that the witness is required to give oral evidence as to any part of the contents of the witness statement.

If no such notice is given the party calling the witness may take it that no part of the witness statement is objected to and that it will stand as the witness' evidence in chief if adopted by the witness.

- 22. If the party calling the witness accepts the requirement referred to in the preceding sub-paragraph, evidence of that part of the content of the witness statement must be given orally.
- 23. The List Judge will, before the witness is sworn, determine any unresolved issues arising out of any such notice.
- 24. The List Judge may require the witness to give oral evidence as to any part of the content of the witness statement, notwithstanding that no party has required this.
- 25. A copy of the witness statement, after deletion of any inadmissible passages and passages as to which oral evidence is to be given, must be available at trial for use by the witness and for tender in evidence.
- 26. A witness when sworn, and having given evidence of formal matters, must be asked whether the content of the witness statement is true and correct. If an affirmative answer is given, the witness will be taken to have adopted the witness statement and the witness statement may be admitted into evidence.
- 27. The witness statement when adopted will stand as the evidence in chief of the witness subject to these orders. The party calling a witness may not, without leave, adduce further evidence in chief from that witness.

### **Pre-trial checklist**

- 28. Each party must send to the associate to the List Judge (with a copy to each other party) a completed pre trial checklist<sup>47</sup> on or before #.

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<sup>47</sup> See Schedule 3.



**Counsels' joint estimate of trial duration**

29. Counsel for the parties must provide to the List Judge a joint memorandum, signed by all counsel, containing a detailed estimate of the duration of the trial, broken down as follows:
- (a) time in opening submissions of each party;
  - (b) time for any objections to evidence;
  - (c) time for the evidence of each witness;
  - (d) time for final submissions of each party.

The estimate is to be in two parts:

- (a) on the assumption that the trial proceeds on all issues, including quantification of damage;
- (b) on the assumption that the trial proceeds on liability issues only, excluding any issues concerning quantification of damage.

If there is any disagreement between counsel, this should be stated in the joint memorandum and the rival positions or estimates set out.

30. The joint memorandum is to be filed by email to the associate to the List Judge by 4:00 pm on #.
31. If, after the report is delivered, a barrister or solicitor for a party has reason to believe that the information provided is no longer accurate, it is the responsibility of that lawyer to bring this to the attention of the List Judge immediately.
32. Costs are reserved.

## APPENDIX

### *Overriding Objective (or Overarching Purpose)*

In relation to the nature and purpose of an overriding objective, note the following explanatory comments of Lord Woolf in *Access to Justice – Final Report* (HMSO, 1996), 174-5:

“10. Every word in the rules should have a purpose, but every word cannot sensibly be given a minutely exact meaning. Civil procedure involves more judgment and knowledge than the rules can directly express. In this respect, rules of court are not like an instruction manual for operating a piece of machinery. Ultimately their purpose is to guide the court and the litigants towards the just resolution of the case. Although the rules can offer detailed directions for the technical steps to be taken, the effectiveness of those steps depends upon the spirit in which they are carried out. That in turn depends on an understanding of the fundamental purpose of the rules and of the underlying system of procedure.

11. In order to identify that purpose at the outset, I have placed at the very beginning of the rules [Rule 1] a statement of their overriding objective. This is intended to govern the operation of all the rules and in particular the choices which the court makes in managing each case and in interpreting the rules. In the interim report I set out the likely text of this rule. Because of its importance, I make no apology for setting it out again here, in its updated form.

- ‘(1) The overriding objective of these Rules is to enable the court to deal with cases justly.
- (2) The court must apply the Rules so as to further the overriding objective.
- (3) Dealing with a case justly includes –
  - (a) ensuring, so far as is practicable, that the parties are on an equal footing;
  - (b) saving expense;
  - (c) dealing with the case in ways which are proportionate –
    - (i) to the amount of money involved;
    - (ii) to the importance of the case;
    - (iii) to the complexity of the issues; and
    - (iv) to the parties’ financial position;
  - (d) ensuring that it is dealt with expeditiously; and
  - (e) allotting to it an appropriate share of the court’s resources, while taking into account the need to allot resources to other cases.’

12. The new rules are deliberately not designed expressly to answer every question which could arise. Rule 1, the statement of the objective, provides a compass to guide courts and litigants and legal advisers as to their general course. Where detailed instructions are needed, matters of general application will be dealt with in the rules; other matters will, I hope, be capable of being dealt with in practice directions and practice guides.”

Terminology varies as between various court rules and legislative provisions. So, in the context of the provisions of the Victorian *Civil Procedure Act 2010* the corresponding expression used is “Overarching Purpose”.

### *Case Management*

Case management requires not only consideration of the interests of the parties to a proceeding, but also, the general public interest, as emphasised by French CJ in *Aon Risk Services Aust Ltd v ANU* (2009) 239 CLR 175 at 189-90 (footnotes omitted):

“25. Recognition of the public interest in the administration of civil justice procedures in Australia and the United Kingdom predates the Woolf Report and its attendant reforms. In *Dawson v Deputy Commissioner of Taxation*, King CJ acknowledged the responsibility of judges to ensure, ‘so far as possible and subject to overriding considerations of justice’, that the limited resources which the State commits to the administration of justice are not wasted by the failure of parties to adhere to trial dates of which they have had proper notice. In a late amendment case considered by the House of Lords in 1987, there was a marked departure from the approach of Bowen LJ in *Cropper v Smith*. Lord Griffiths required that judges considering amendments weigh in the balance: ‘the pressure on the courts caused by the great increase in litigation and the consequent necessity that, in the interests of the whole community, legal business should be conducted efficiently.’ The same indulgence could not be shown towards the negligent conduct of litigation as might have been possible in a ‘more leisured age’. That approach was followed by Sheppard J in a revenue case heard in the Federal Court. And in the New South Wales Court of Appeal in *GSA Industries*, Samuels JA said that: ‘the emollient effect of an order for costs as a panacea may now be consigned to the Aladdin’s cave which Lord Reid rejected as one of the fairy tales in which we no longer believe.’ The approach reflected in these authorities was applied by a majority of the Full Court of the Federal Court in *Bomanite Pty Ltd v Slatex Corporation Aust Pty Ltd*.

The significance of the public interest, generally, and in the administration of justice, is expressly recognised in Part 4.2 of the Act (Case Management), particularly in sub-section 47(1). In relation to case management, the following comment is made in *Civil Procedure* (2010, Sweet and Maxwell, London)(the “White Book”), Vol 1, p 9:

“A judge’s responsibility in the course of properly managing cases requires him, when exercising his discretion in accordance with the overriding objective . . . , to consider the effect of his decision on civil proceedings generally, for example, its effect in deterring parties involved in other proceedings from engaging in improper conduct (*Jones v University of Warwick* [2003] EWCA Civ 151; *The Times*, February 7, 2003, CA, per Lord Woolf CJ).”

This is also an aspect of weighing the more general public interest in efficient use of scarce judicial and court resources.

## ***Civil Procedure Act 2010 (Vic)***

[Extracts only]

### **CHAPTER 1—PRELIMINARY**

#### **1 Purposes**

(1) The main purposes of this Act are—

S. 1(1)(a)  
amended by  
No. 1/2011  
s. 3(a).

- (a) to reform and modernise the laws, practice, procedure and processes relating to civil proceedings in the Supreme Court, the County Court and the Magistrates' Court and provide for uniformity;
- (b) to simplify the language relating to civil procedure;
- (c) to provide for an overarching purpose in relation to the conduct of civil proceedings to facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute;
- (d) to amend various Acts in relation to the conduct of civil proceedings to reflect the new procedures.

(2) Without limiting subsection (1), this Act provides for—

- (a) overarching obligations for participants in civil proceedings to improve standards of conduct in litigation;

\* \* \* \* \*

- (c) the enhancement of case management powers of the courts, including in relation to discovery;
- (d) further enhancement of appropriate dispute resolution processes;
- (e) reform of the law relating to summary judgment;
- (f) clarifying sanctions available to courts in relation to contravention of discovery obligations.

...

### 3 Definitions

In this Act—

***appropriate dispute resolution*** means a process attended, or participated in, by a party for the purposes of negotiating a settlement of the civil proceeding or resolving or narrowing the issues in dispute, including, but not limited to—

- (a) mediation, whether or not referred to a mediator in accordance with rules of court;
- (b) early neutral evaluation;
- (c) judicial resolution conference;
- (d) settlement conference;
- (e) reference of a question, a civil proceeding or part of a civil proceeding to a special referee;
- (f) expert determination;
- (g) conciliation;
- (h) arbitration;

S. 1(2)(b) repealed by No. 1/2011 s. 3(b).

S. 3 def. of *appropriate dispute resolution* amended by No. 1/2011 s. 4(1).

\* \* \* \* \*

S. 3 def. of *civil dispute* repealed by No. 1/2011 s. 4(2).

*civil proceeding* means any proceeding in a court other than a criminal proceeding or quasi- criminal proceeding;

*court* means the following courts—

- (a) the Supreme Court;
- (b) the County Court;
- (c) the Magistrates' Court;

*criminal proceeding* means a proceeding to which the **Criminal Procedure Act 2009** applies and includes—

- (a) committal proceedings;
- (b) proceedings relating to bail;
- (c) proceedings relating to the sentencing of an accused;

*expert witness*, in relation to a civil proceeding, means a person who has specialised knowledge based on the person's training, study or experience;

...

*law practice* has the same meaning as it has in the **Legal Profession Act 2004**;

*legal practitioner* means an *Australian legal practitioner* within the meaning of the **Legal Profession Act 2004**;

*overarching purpose* has the meaning given in section 7;

*overarching obligations* means the obligations set out in sections 16 to 26;

*overarching obligations certification* means the certification required under section 41;

*paramount duty* means the duty set out in section 16;

*party* means party to a civil proceeding;

*penalty interest rate* means the rate for the time being fixed under section 2 of the **Penalty Interest Rates Act 1983**;

*person* includes an unincorporated association, a firm and a partnership;

\* \* \* \* \*

S. 3 def. of *pre-litigation requirements* repealed by No. 1/2011 s. 4(2).

S. 3 def. of  
pre-litigation  
requirements  
compliance  
certification  
repealed by  
No. 1/2011  
s. 4(2).

\* \* \* \* \*

## CHAPTER 2—OVERARCHING PURPOSE AND OVERARCHING OBLIGATIONS

### PART 2.1—OVERARCHING PURPOSE

#### 7 Overarching purpose

- (1) The overarching purpose of this Act and the rules of court in relation to civil proceedings is to facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute.
- (2) Without limiting how the overarching purpose is achieved, it may be achieved by—
  - (a) the determination of the proceeding by the court;
  - (b) agreement between the parties;
  - (c) any appropriate dispute resolution process—
    - (i) agreed to by the parties; or
    - (ii) ordered by the court.

#### 8 Court to give effect to overarching purpose

- (1) A court must seek to give effect to the overarching purpose in the exercise of any of its powers, or in the interpretation of those powers, whether those powers—
  - (a) in the case of the Supreme Court, are part of the Court's inherent jurisdiction, implied jurisdiction or statutory jurisdiction; or
  - (b) in the case of a court other than the Supreme Court are part of the court's implied jurisdiction or statutory jurisdiction; or
  - (c) arise from or are derived from the common law or any procedural rules or practices of the court.
- (2) Subsection (1) applies despite any other Act (other than the **Charter of Human Rights and Responsibilities Act 2006**) or law to the contrary.

#### 9 Court's powers to further the overarching purpose

- (1) In making any order or giving any direction in a civil proceeding, a court shall further the overarching purpose by having regard to the following objects—
  - (a) the just determination of the civil proceeding;

- (b) the public interest in the early settlement of disputes by agreement between parties;
- (c) the efficient conduct of the business of the court;
- (d) the efficient use of judicial and administrative resources;
- (e) minimising any delay between the commencement of a civil proceeding and its listing for trial beyond that reasonably required for any interlocutory steps that are necessary for—
  - (i) the fair and just determination of the real issues in dispute; and
  - (ii) the preparation of the case for trial;
- (f) the timely determination of the civil proceeding;
- (g) dealing with a civil proceeding in a manner proportionate to—
  - (i) the complexity or importance of the issues in dispute; and
  - (ii) the amount in dispute.

s. 9

- (2) For the purposes of subsection (1), the court may have regard to the following matters—
- (a) the extent to which the parties have complied with any mandatory or voluntary pre-litigation processes;
  - (b) the extent to which the parties have used reasonable endeavours to resolve the dispute by agreement or to limit the issues in dispute;
  - (c) the degree of promptness with which the parties have conducted the proceeding, including the degree to which each party has been timely in undertaking interlocutory steps in relation to the proceeding;
  - (d) the degree to which any lack of promptness by a party in undertaking the proceeding has arisen from circumstances beyond the control of that party;
  - (e) the degree to which each person to whom the overarching obligations apply has complied with the overarching obligations in relation to the proceeding;
  - (f) any prejudice that may be suffered by a party as a consequence of any order proposed to be made or direction proposed to be given by the court;
  - (g) the public importance of the issues in dispute and the desirability of a judicial determination of those issues;
  - (h) the extent to which the parties have had the benefit of legal advice and representation.

S. 9(2)(a)  
amended by  
No. 1/2011  
s. 6.

- (3) This section does not—

(a) limit any other power of a court to make orders or give directions; or

**s. 9**

(b) preclude the court from considering any other matters when making any order or giving any direction.

---



## **PART 2.2—APPLICATION OF THE OVERARCHING OBLIGATIONS**

### **10 Application of overarching obligations—participants**

**s. 10**

- (1) The overarching obligations apply to—
  - (a) any person who is a party;
  - (b) any legal practitioner or other representative acting for or on behalf of a party;
  - (c) any law practice acting for or on behalf of a party;
  - (d) any person who provides financial assistance or other assistance to any party in so far as that person exercises any direct control, indirect control or any influence over the conduct of the civil proceeding or of a party in respect of that civil proceeding, including, but not limited to—
    - (i) an insurer;
    - (ii) a provider of funding or financial support, including any litigation funder.
- (2) Subject to subsection (3), the overarching obligations do not apply to any witness in a civil proceeding.
- (3) The overarching obligations (other than the overarching obligations specified in sections 18, 19, 22 and 26) apply to any expert witness in a civil proceeding.
- (4) Subsection (3) is in addition to, and not in derogation of, any existing duties applying to expert witnesses.

### **11 Application of overarching obligations—civil proceedings**

The overarching obligations apply in respect of the conduct of any aspect of a civil proceeding in a court, including, but not limited to—

- (a) any interlocutory application or interlocutory proceeding;
- (b) any appeal from an order or a judgment in a civil proceeding;
- (c) any appropriate dispute resolution undertaken in relation to a civil proceeding.

### **12 Overarching obligations prevail over certain other obligations and duties**

Subject to the paramount duty, the overarching obligations prevail over any legal obligation, contractual obligation or other obligation which a person to whom the overarching obligations apply may have, to the extent that the obligations are inconsistent.

### **13 Overarching obligations and legal practitioners**

- (1) The overarching obligations do not override any duty or obligation of a legal practitioner to a client, whether arising under the common law or by or under any statute or otherwise, to the extent that those duties and obligations and the overarching obligations can operate consistently.

s. 14

(2) Despite subsection (1), a legal practitioner or a law practice engaged by, or on behalf of, a client in connection with a civil proceeding must comply with the overarching obligations despite any obligation the legal practitioner or the law practice has to act in accordance with the instructions or wishes of the client.

(3) In the case of any inconsistency between any overarching obligation and a duty or obligation referred to in subsection (1) or an instruction or a wish referred to in subsection (2)—

- (a) the overarching obligation prevails to the extent of that inconsistency; and
- (b) in the case of the instruction or wish of a client, the legal practitioner is not required to comply with any instruction or wish of the client which is inconsistent with the overarching obligation.

#### **14 Legal practitioner or law practice not to cause client to contravene overarching obligations**

A legal practitioner or a law practice engaged by, or on behalf of, a client in connection with a civil proceeding must not by his, her or its conduct cause the client to contravene any overarching obligation.

#### **15 Legal practitioner's duty to court not overridden**

Nothing in this Part overrides any duty or obligation of a legal practitioner to the court, whether arising under the common law or by or under any statute or otherwise.

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## **PART 2.3—THE OVERARCHING OBLIGATIONS**

### **16 Paramount duty**

**s. 10**

Each person to whom the overarching obligations apply has a paramount duty to the court to further the administration of justice in relation to any civil proceeding in which that person is involved, including, but not limited to—

- (a) any interlocutory application or interlocutory proceeding;
- (b) any appeal from an order or a judgment in a civil proceeding;
- (c) any appropriate dispute resolution undertaken in relation to a civil proceeding.

### **17 Overarching obligation to act honestly**

A person to whom the overarching obligations apply must act honestly at all times in relation to a civil proceeding.

### **18 Overarching obligation—requirement of proper basis**

A person to whom the overarching obligations apply must not make any claim or make a response to any claim in a civil proceeding that—

- (a) is frivolous; or
- (b) is vexatious; or
- (c) is an abuse of process; or
- (d) does not, on the factual and legal material available to the person at the time of making the claim or responding to the claim, as the case requires, have a proper basis.

### **19 Overarching obligation to only take steps to resolve or determine dispute**

For the purpose of avoiding undue delay and expense, a person to whom the overarching obligations apply must not take any step in connection with any claim or response to any claim in a civil proceeding unless the person reasonably believes that the step is necessary to facilitate the resolution or determination of the proceeding.

### **20 Overarching obligation to cooperate in the conduct of civil proceeding**

A person to whom the overarching obligations apply must cooperate with the parties to a civil proceeding and the court in connection with the conduct of that proceeding.

### **21 Overarching obligation not to mislead or deceive**

A person to whom the overarching obligations apply must not, in respect of a civil proceeding, engage in conduct which is—

- (a) misleading or deceptive; or
- (b) likely to mislead or deceive.

## 22 Overarching obligation to use reasonable endeavours to resolve dispute

s. 23

A person to whom the overarching obligations apply must use reasonable endeavours to resolve a dispute by agreement between the persons in dispute, including, if appropriate, by appropriate dispute resolution, unless—

- (a) it is not in the interests of justice to do so; or
- (b) the dispute is of such a nature that only judicial determination is appropriate.

### Example

A proceeding where a civil penalty is sought may be of such a nature that only judicial determination is appropriate.

## 23 Overarching obligation to narrow the issues in dispute

If a person to whom the overarching obligations apply cannot resolve a dispute wholly by agreement, the person must use reasonable endeavours to—

- (a) resolve by agreement any issues in dispute which can be resolved in that way; and
  - (b) narrow the scope of the remaining issues in dispute—
- unless—
- (c) it is not in the interests of justice to do so; or
  - (d) the dispute is of such a nature that only judicial determination is appropriate.

## 24 Overarching obligation to ensure costs are reasonable and proportionate

A person to whom the overarching obligations apply must use reasonable endeavours to ensure that legal costs and other costs incurred in connection with the civil proceeding are reasonable and proportionate to—

- (a) the complexity or importance of the issues in dispute; and
- (b) the amount in dispute.

## 25 Overarching obligation to minimise delay

For the purpose of ensuring the prompt conduct of a civil proceeding, a person to whom the overarching obligations apply must use reasonable endeavours in connection with the civil proceeding to—

- (a) act promptly; and
- (b) minimise delay.

## 26 Overarching obligation to disclose existence of documents

- (1) Subject to subsection (3), a person to whom the overarching obligations apply must disclose to each party the existence of all documents that are, or have been, in that person's possession, custody or control—
  - (a) of which the person is aware; and
  - (b) which the person considers, or ought reasonably consider, are critical to the resolution of the dispute.
- (2) Disclosure under subsection (1) must occur at—
  - (a) the earliest reasonable time after the person becomes aware of the existence of the document; or
  - (b) such other time as a court may direct.
- (3) Subsection (1) does not apply to any document which is protected from disclosure—
  - (a) on the grounds of privilege which has not been expressly or impliedly waived; or
  - (b) under any Act (including any Commonwealth Act) or other law.
- (4) The overarching obligation imposed by this section—
  - (a) is an ongoing obligation for the duration of the civil proceeding; and
  - (b) does not limit or affect a party's obligations in relation to discovery.

**27 Protection and use of information and documents disclosed under overarching obligation in section 26**

- (1) A person who receives any information or documents provided by another person involved in the civil proceeding as a result of disclosure in compliance with the overarching obligation in section 26 is subject to an obligation not to use the information or documents, or permit the information or documents to be used, for a purpose other than in connection with the civil proceeding.
- (2) The obligation under subsection (1) is taken to be an obligation to the court, contravention of which constitutes contempt of court.
- (3) A person—
  - (a) may agree in writing to the use of information or documents otherwise protected under subsection (1); or
  - (b) may be released from the obligation imposed under subsection (1) by leave of the court.
- (4) Without limiting this section or discovery in any civil proceeding any information or documents exchanged in compliance with the overarching obligation in section 26 is required to be discovered in the civil proceeding to be admissible in that proceeding.

(5) Nothing in this section limits any other undertaking to a court (implied or specific) whether at common law or otherwise, in relation to information or documents disclosed or discovered in a civil proceeding.

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s. 27

**PART 2.4—SANCTIONS FOR CONTRAVENING THE OVERARCHING OBLIGATIONS****28 Court may take contravention of overarching obligations into account****s. 30**

- (1) In exercising any power in relation to a civil proceeding, a court may take into account any contravention of the overarching obligations.
- (2) Without limiting subsection (1), in exercising its discretion as to costs, a court may take into account any contravention of the overarching obligations.

**29 Court may make certain orders**

- (1) If a court is satisfied that, on the balance of probabilities, a person has contravened any overarching obligation, the court may make any order it considers appropriate in the interests of justice including, but not limited to—
  - (a) an order that the person pay some or all of the legal costs or other costs or expenses of any person arising from the contravention of the overarching obligation;
  - (b) an order that the legal costs or other costs or expenses of any person be payable immediately and be enforceable immediately;
  - (c) an order that the person compensate any person for any financial loss or other loss which was materially contributed to by the contravention of the overarching obligation, including—
    - (i) an order for penalty interest in accordance with the penalty interest rate in respect of any delay in the payment of an amount claimed in the civil proceeding; or
    - (ii) an order for no interest or reduced interest;
  - (d) an order that the person take any steps specified in the order which are reasonably necessary to remedy any contravention of the overarching obligations by the person;
  - (e) an order that the person not be permitted to take specified steps in the civil proceeding;
  - (f) any other order that the court considers to be in the interests of any person who has been prejudicially affected by the contravention of the overarching obligations.
- (2) An order under this section may be made—
  - (a) on the application of—
    - (i) any party to the civil proceeding; or
    - (ii) any other person who, in the opinion of the court, has a sufficient interest in the proceeding; or
  - (b) on the court's own motion.
- (3) This section does not limit any other power of a court to make any order, including any order as to costs.

**30 Applications for orders under section 29**

s. 31
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- (1) An application for an order under section 29 is to be made—
  - (a) in the court in which the civil proceeding was, or is being, heard; and
  - (b) in accordance with the rules of court.
- (2) An application for an order under section 29 must be made prior to the finalisation of the civil proceeding to which the application relates (excluding any period for appeals).
- (3) For the purposes of subsection (2), if an order, including an order in respect of costs, is made after the date of finalisation of the civil proceeding to which the application relates, the date of making of the last of the orders is taken to be the date of finalisation of that proceeding.

### **31 Extension of time for application**

- (1) Despite section 30(2), a person may apply to the court for an extension of time to apply for an order under section 29 after the finalisation of the civil proceeding.
  - (2) The court may grant an extension of time for making an application under section 29 if satisfied that the party making the application was not aware of the contravention of the overarching obligations until after the end of the period specified in section 30(2).
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